Filed 5/13/19 P. v. Cappello CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARK WILLIAM CAPPELLO, Defendant and Appellant.	A148470 (Sonoma County Super. Ct. No. SCR630974)

Defendant Mark William Cappello appeals his conviction for three counts of special circumstances murder, first degree burglary, conspiracy to possess marijuana for sale and transport, and first degree residential robbery. Cappello contends (1) the trial court erred by admitting interviews of codefendants Odin Dwyer and Francis Dwyer,[1] (2) a law enforcement witness improperly vouched for the Dwyers' credibility, (3) character evidence was improperly admitted, (4) a defense expert witness was improperly excluded, (5) evidence that a defense witness had been a "reliable confidential informant" was improperly excluded, and the prosecutor's discussion of this witness in rebuttal argument was misconduct, (6) cumulative error, and (7) a change in the law on firearm enhancements requires remand for resentencing.

We will remand to allow the trial court to consider the firearm enhancements under the current sentencing scheme and otherwise affirm.

[1] For brevity and clarity, we refer to Odin Dwyer and Francis Dwyer by first name only. We sometimes refer to them together as the Dwyers.

FACTUAL AND PROCEDURAL BACKGROUND

Around 3:00 p.m. on February 5, 2013, Dylan Butler drove to his mother's cabin on Ross Station Road in Forestville looking for his brother, Raleigh Butler. The front door was open, and inside Dylan discovered three bodies in the back bedroom, including the body of his brother. The other two victims were Richard Lewin and Todd Klarkowski. Each victim died from a single gunshot to the head. The scene suggested the victims were killed while processing large amounts of marijuana for sale or transport. The victims were wearing latex gloves; marijuana and a FoodSaver vacuum sealing machine were found nearby; a duffel bag at the front door of the cabin contained nine one-pound bags of marijuana packed in turkey baster bags; and Butler had $8,600 in cash in his jacket pocket.

The Sonoma County District Attorney charged Cappello, along with father and son Francis and Odin Dwyer, with three counts of murder and additional offenses. Cappello was alleged to have been the shooter, and Odin and Francis were charged as accessories. The Dwyers reached plea agreements with the prosecution, agreeing to plead no contest to various charges and to testify against Cappello. In exchange, Odin was promised a sentence of 20 years, four months, and Francis was promised a sentence of eight years.[2]

Cappello was tried before a jury on six charges: three counts of murder (Pen. Code, § 187, subd. (a); counts 1–3) with special circumstances[3] and an allegation of

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[2] Odin pleaded no contest to 15 counts—burglary, conspiracy to commit burglary, three counts of involuntary manslaughter, transportation of marijuana, processing marijuana, conspiracy to transport marijuana, possession of marijuana for sale, conspiracy to possess marijuana for sale, accessory to robbery, three counts of accessory to murder, and receipt of stolen property—and admitted firearm enhancement allegations. Francis pleaded no contest to transportation of marijuana, conspiracy to transport marijuana, possession of marijuana for sale, conspiracy to possess marijuana for sale, and accessory to murder and admitted firearm enhancements.

[3] The district attorney alleged the murders were committed during the attempted commission of robbery and burglary, for financial gain, and by means of lying in wait,

personal discharge of a firearm (*id*., § 12022.53, subd. (d)), first degree burglary (*id*., § 459; count 4) with a firearm allegation (*id*., § 12022.5, subd. (a)), conspiracy to commit possession of marijuana for sale and sale or transportation of marijuana (*id*., § 182, subd. (a)(1), Health & Saf. Code, §§ 11359 and 11360, subd. (a); count 5), and first degree residential robbery of Butler (Pen. Code, § 211; count 6) with a firearm allegation (*id*., § 12022.53, subd. (d)).

The Prosecution's Case

Cappello's Work Transporting Marijuana Interstate

Cappello lived in Central City, Colorado. Since about 2010, he worked for Jeffrey Dings, transporting marijuana from Arizona to the East Coast and sometimes carrying large amounts of cash, up to $500,000, back from the East Coast.[4] Dings paid Cappello $100 per pound of marijuana transported. Cappello used his white Ford Bronco and a couple of trailers, including a horse trailer, and was known for having an "enzyme" he sprayed on packaged marijuana, which he claimed neutralized the odor.

Financial Troubles in 2012

In 2012, Dings's smuggling business suffered due to increased law enforcement interdiction. As a result, there was less transportation work for Cappello, and Dings had difficulty paying him for work he did do.[5]

Dings put together a deal to buy marijuana in California and transport it to Colorado in October 2012. The deal involved Morgan Kear, victim Todd Klarkowski,

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and Cappello committed multiple murders. (Pen. Code, § 190.2, subd. (a)(17), (1), (15), and (3).)

[4] Dings smuggled marijuana from Mexico and distributed it across the country. At the time of trial, Dings had two convictions for international smuggling and trafficking involving thousands of pounds of marijuana and another conviction for transportation or distribution of methamphetamine with a firearm, and he was serving a sentence in federal prison. He testified under a grant of immunity.

[5] For a trip in January 2012, Dings owed Cappello $75,000 but only paid him $40,000 at first and asked Cappello to wait for the balance. Dings testified Cappello "was broke and he was angry" and needed money for bills. On one occasion, Cappello took 20 pounds of Dings's marijuana to recoup expenses he claimed Dings owed him.

and Cappello. Dings was friends with Kear, and Kear knew Klarkowski, who was a small-time marijuana dealer from Colorado. Cappello met Klarkowski for the first time during this deal.

Dings agreed to pay Cappello $40,000 to haul 400 pounds of marijuana from California to Denver. Klarkowski provided $100,000 for the marijuana, and another person was supposed to bring $180,000, but he did not show up. Cappello ended up transporting only 101 pounds of marijuana. Cappello still expected full payment plus $5,000 for the time he waited in California, and Dings did not pay him immediately.

Cappello was very angry he was not paid on time. Dings, who had thought of Cappello as a friend, had never seen "greed" like this from him. Dings started to notice "some desperation" in Cappello. Dings described Cappello as angry, frustrated, and "making threats of violence."

Cappello Hires Odin Dwyer to Transport Marijuana for Failed October 2012 Deal

Odin met Cappello in October 2010 when he answered Cappello's ad looking for laborers to do landscaping work at his house in Central City. Odin did labor jobs for Cappello for $10 per hour and also began working at Cappello's brother Michael's ranch. Cappello and Odin talked about Odin helping Cappello transport marijuana to the East Coast, but it never happened. In fall 2012, Michael Cappello let Odin go from working at his ranch, and Odin needed money.

Odin's first opportunity to work with Cappello in transporting marijuana came in October 2012. Dings put together a deal to procure 600 pounds of marijuana from California. Dings wanted Cappello to be the driver, and Cappello decided to use a rented recreational vehicle (RV) and have Odin drive the RV.

Odin, however, had a conviction for driving under the influence (DUI) and was unable to drive a rental car himself. So he asked his roommate Leslie Moffatt to go with him and drive the RV. Moffatt rented an RV in her name using Cappello's credit card. She and Odin drove to California in the RV and waited for Cappello to fly out and set up the deal. They met Cappello in the San Francisco Bay Area but were told the deal fell through. Moffatt and Odin were told there was another pickup location, and they drove

to Ventura and stayed there for about a week in the RV. Cappello met them in Ventura a couple times. On one occasion, Cappello appeared very agitated and was yelling on his phone. Moffatt heard him make comments "that somebody was going to die behind this." In the end, there was no deal and nothing to transport to Colorado.

Cappello was furious and told Dings he was out $20,000 in expenses for the trip. Odin and Moffatt were supposed to receive $5,000 each for the job, but Cappello paid Moffatt only $800 and told her, "You got a free vacation. I don't know what the fuck your problem is." Cappello also told Moffatt that he was going to steal a car from the person he blamed for the failure of the deal. He asked her if she wanted the stolen car, and she declined. Cappello eventually paid Odin $5,000 in installments. Dings never paid Cappello his full fee.

Odin had stopped doing odd jobs at Cappello's house by August or September 2012, but they continued to talk about doing another transportation job so Cappello could recoup his losses and Odin could make some money.

February 2013 Marijuana Deal with Lewin, Klarkowski, Butler

Richard Lewin was a stockbroker who lived in New York. Lewin also distributed marijuana in New York, some of which he purchased in Colorado. He would fly to Colorado with $50,000 to $100,000 in cash, buy marijuana, and have a driver deliver the marijuana to New York. Lewin met Klarkowski in Colorado through a mutual acquaintance.

In late January 2013, Lewin and Klarkowski met to discuss importing marijuana from California to New York.[6] Klarkowski planned to use Cappello as a driver.[7] Klarkowski told a friend he was going to California on February 4 for a deal involving 80

[6] Further dates occurred in 2013 unless specified otherwise.

[7] Klarkowski told a friend he had a transporter named Mark who had a horse trailer and was an expert in masking the smell of marijuana using an "enzyme." He told another friend his driver was Italian and lived in the mountains. (Central City is in the mountains.)

pounds of marijuana. He said about $150,000 to $170,000 in cash would be driven to California for the deal.

Raleigh Butler lived in Truckee; he worked as a ski instructor and lift operator and also sold marijuana. Butler met Lewin through a mutual friend, and Lewin later contacted Butler about buying marijuana in California. Lewin told Butler he had a driver who was a "pro" who would drive the marijuana from California to New York. Butler was a middleman for a supplier, and his fee was $100 per pound of marijuana procured. Butler left Truckee for Sonoma County on February 4.

Cappello offered to pay Odin $10,000 to help with the California marijuana deal. Odin understood that Cappello would haul the marijuana and he would act as a scout.

Francis, Odin's father, lived in Truth or Consequences, New Mexico, and drove a 1997 gold Ford Ranger pickup truck. He was visiting Odin in Colorado at the time and offered to drive Odin for the job.[8] Francis understood the trip involved acquiring marijuana in California and driving it to Long Island, New York. He knew Odin would be preparing the marijuana for transportation, and he thought of himself as giving Odin a ride.

The morning of Sunday, February 3, Cappello, Odin, and Francis met at a Denny's restaurant in Denver. Francis drove his Ford Ranger with Odin, and Cappello drove his white Ford Bronco with his dog. They headed west and stayed the first night in a motel in Utah or Nevada. Odin and Francis shared a room, Cappello had his own room, and Cappello paid for both rooms.

The next day, Monday, February 4, Cappello, Odin, and Francis arrived in Santa Rosa, California. Cappello checked into a hotel on Santa Rosa Avenue, and Odin and Francis checked into a motel 10 blocks away.

[8] Francis was 68 years old at the time of trial and was not working in February 2013. He had worked as a plumber and also worked as a professional bear hunting guide in Maine for a few years. Francis met Cappello about a year earlier when he helped Odin dig a ditch to run a water line to Cappello's house in Central City.

Lewin and Klarkowski flew into San Francisco the same day, and Lewin rented two rooms at the Sebastopol Inn. In the afternoon, Lewin and Klarkowski went to a restaurant/bar in Sebastopol. Cappello met them there and was introduced to Lewin. Cappello, Lewin, and Klarkowski sat and talked and drank at the bar for more than an hour. Then Butler arrived, and Lewin introduced Butler to Cappello. The Dwyers were not part of this meeting.[9]

The Murders and the Getaway

On Tuesday, February 5, Odin and Francis checked out of their motel and went to a Denny's restaurant. Cappello met them there and told them he was waiting for a phone call. Cappello asked Odin to pick up a few bottles of rubbing alcohol. Odin and Francis bought the rubbing alcohol and went to Cappello's hotel room. Wearing gloves, Cappello used the rubbing alcohol and a rag or paper towel to clean a disassembled firearm, clips, and live rounds. Cappello told Francis the rounds "were special bullets that would . . . go through almost anything and traveled way faster than what a .45 bullet was supposed to."

After Cappello received a phone call, he said everyone was ready to go. Odin went with Cappello in Cappello's Bronco, and Francis stayed in the hotel room with Cappello's dog. On the ride, Cappello told Odin he wanted it to seem like he had another person working with him, "Vic," who was surveilling the area for security purposes.[10]

Cappello and Odin met Lewin and Klarkowski and followed them to a little cabin on Ross Station Road. Before Cappello got out of the Bronco, he put the gun under his shirt behind his back. He pulled an ice pick out of the console and gave it to Odin.

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[9] The meeting among Lewin, Klarkowski, Cappello, and Butler was established by surveillance video taken at the restaurant/bar. Neither Odin nor Francis ever appears in the surveillance video.

[10] Previously, Cappello had mentioned to Odin that he was paid based on how many people were on his crew. He talked about "Vic," a fictional member of the crew who was supposed to be a security advisor. On the ride to the deal, Cappello said he wanted it to seem like "Vic" was in a van nearby scanning the area for electronic signals to make sure the police were not going to raid the deal.

At the cabin, Butler came out and greeted everyone. Everyone was in a good mood, and they started looking at the marijuana, which was in large bags. Cappello asked the men to take the batteries out of their phones and put them on the table, which they did. Odin did not do so because he was supposed to be in contact with "Vic."

Odin overheard Cappello say to one of the men he would pick up "40 something thousand" dollars at his hotel. Odin never saw any money in the cabin.[11]

Butler said they should move to the back room. In the back room, they tore open trash bags and laid them down to keep the floor clean. Butler had a Seal-a-Meal machine set up to start resealing the marijuana in airtight plastic bags. Odin helped package the marijuana and spray it with the "enzyme" before it was sealed in another plastic bag. Everyone was wearing latex gloves. Cappello stood and watched while everyone else packaged the marijuana.

Cappello asked Odin to check in with "Vic," and Odin got up and pretended to make a call. Odin pretended to call "Vic" three times. For the third fake call to "Vic," Odin got up and left the back room. He walked into the living room and heard "three quick successive pops." He looked down the hallway and saw Cappello in the doorway with his arms extended and a gun in his hand.[12] Odin asked Cappello, " 'What . . . did you do that for?' " Cappello responded, " 'It was something that had to be done.' " Cappello told Odin to get the marijuana. Cappello said he couldn't find one of the bullet casings and asked Odin to look for the extra casing. Odin brought the marijuana into the living room as Cappello got his Bronco. Cappello said to leave some of the marijuana

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[11] Odin thought it was odd Cappello had to get money from his hotel because he was under the impression Cappello kept money in a lock box behind the seat in his Bronco. Cappello implied during the trip that he was bringing $275,000 with him.

[12] Odin testified that each time he pretended to call "Vic," he dialed his friend. Evidence was presented that Odin's cell phone made three short outgoing calls to the same number at 9:59 a.m., 10:24 a.m., and 10:50 a.m. and, based on cell tower information, the calls could have been made from the Ross Station Road cabin. Thus, under the prosecution's theory, the shootings likely occurred during the third outgoing call at 10:50 a.m.

behind "so it would look like a weed deal that had gone bad." Cappello backed his Bronco up to the front door of the cabin, they loaded the marijuana, and drove away.[13]

When Cappello and Odin returned to the hotel room, Francis thought Cappello "was kind of his normal self" but Odin was "pretty wound up." Cappello started disassembling his gun and cleaning it with rubbing alcohol while wearing gloves. Cappello gave Odin a pouch with the barrel and other small parts and bullets and told him to put it in a storm drain. Francis drove Odin to get rid of the gun parts. They drove toward Sonoma State University, and Odin tossed the parts and bullets in a creek.[14] The gun parts came from a black Springfield Armory model XD .45 caliber semiautomatic handgun, and the serial number was on the barrel. The registered owner of the gun testified he sold it to Cappello in 2009.

When Francis and Odin returned to the hotel room, Cappello had showered, shaved his beard, and changed his clothes. Cappello checked out of the hotel. Francis and Odin followed him out to the interstate highway. After about an hour of driving, they pulled off the road and stopped underneath an overpass. Cappello said he couldn't drive with the smell of marijuana (they had not gotten very far in packaging the marijuana and spraying it with his "enzyme" when he killed Lewin, Klarkowski, and Butler), and he wanted to put it in Francis's truck. They transferred the marijuana to Francis's truck, and Odin and Cappello threw their gloves down a storm drain. They drove a short distance,

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[13] The cabin, which was rented by Butler's mother, was on a 10-acre parcel that also included a main house, another rental cottage, and a barn. The owners of the 10-acre property were a husband and wife who lived in the main house. The husband, a psychiatrist, saw patients at an office on the property. Around 10:10 a.m. on the morning of February 5, the husband was in the kitchen of the main house when he saw a blue or black passenger vehicle followed by a white SUV drive down the driveway toward Butler's mother's cabin. His first patient was scheduled for 11:00 a.m. that day, and from the office, he would not have noticed vehicles leaving the property.

[14] Law enforcement later recovered the gun parts and some ammunition from the creek based on information provided by Odin after his arrest. A criminalist found that bullet jackets and a cartridge casing found at the crime scene could have been fired from the gun that the recovered parts came from.

Cappello pulled over again, and Francis and Odin followed. Cappello cut the black vinyl bra off the front of his Bronco and threw it down a small ravine. He took the tire cover off the back of his Bronco and put it inside his vehicle. Cappello had tied up his clothes in his jeans, and he threw the bundle over a fence. The gloves, the vinyl bra, and the bundle of clothes were later recovered when Odin rode with law enforcement and pointed out where these items had been disposed of. DNA matching Cappello's DNA was found on the gloves and clothes.

Cappello in his Bronco and Francis and Odin in the Ford Ranger returned to the interstate and headed to Colorado. Francis and Odin spent the night at a casino on the Utah border.

In Colorado, Cappello had Francis and Odin meet him at his girlfriend Jennifer Rogers's house in Central City. They unloaded the marijuana from Francis's truck and put it in the living room. There were 69 pounds of marijuana. Earlier, Cappello told Odin he wanted $30,000 for each of the men he shot, so Odin owed him $90,000. Now at Rogers's house, Cappello told Odin to sell the marijuana for the money he owed.

When Cappello returned from his trip to California on the evening of Wednesday, February 6, his girlfriend Rogers found him "very nervous" and "very agitated." Cappello packed up things from his house and went to Rogers's house. He told her things went terribly wrong, and he needed to make sure the money did not have any prints that might connect him to people in California. Cappello "stayed up all night washing the money that he brought back" by washing the bills in a sink full of hot soapy water. The bills were all $100 bills, and Cappello alluded to the amount being around $100,000. He said he was washing the money because it might have Klarkowski's prints on it.

The next day, Rogers went with Cappello to his brother Mike's ranch, and Cappello took the money into a garage unit at the ranch. (Rogers stayed in the truck and did not see what he did with the money.)

Another occasion, Cappello was driving on Highway 119 with Rogers, and he pulled a gun magazine out of a bag and told her to throw it. He pulled out two boxes of

bullets and opened them. Rogers thought one box was missing four bullets and the other box was full. She threw some out the window, and he told her she wasn't throwing hard enough. Cappello threw the rest out the window and had her throw the boxes in a trash can on the road.

Around February 7 or 8, Cappello told Rogers he would be going to Brazil and he would contact her later.

Arrests

Cappello was arrested on February 14 in Mobile, Alabama. Inside his Bronco, police found three passports, a Colorado driver's license, and a driver's license from Brazil. Odin and Francis were arrested on February 26. When Francis was arrested in New Mexico, he was found with about 12 pounds of marijuana and $6,000. A gun laser sight was also found in his trailer. When Odin was arrested in Colorado, he had about six and a half pounds of marijuana, less than four grams of cocaine, and $11,000 in his car. Law enforcement also found about 45 pounds of marijuana in a storage unit that Odin had access to.

Defense

The defense theory was that the murders occurred around noon when gunshots were heard coming from the direction of the cabin, and Cappello could not have been the shooter because cell phone evidence placed him at his hotel room around then. In his opening statement, defense counsel argued the testimony of the Dwyers was inherently suspect because they were involved in the marijuana deal with the three victims, they were later found with cash and marijuana stolen from the cabin, they disposed of evidence and did not go to the police after the robbery and shootings, and they were initially charged with murder themselves. He suggested Francis was the shooter because an eyewitness saw a truck matching the description of his Ford Ranger close to the cabin within a few minutes of noon, and because Francis was "very skilled with a handgun," and he was in possession of a laser sight for a .45 caliber handgun when he was arrested. Defense counsel also criticized law enforcement's investigation of the case, arguing it "was flawed by a presumption of Mark Cappello's guilt."

Erin Ellis lived somewhat near the cabin on Ross Station Road where the murders occurred. The day of the murders, she heard popping noises that sounded like multiple gunshots as she entered her house. She looked out on her pasture and noticed her horses had turned their heads so their ears were in the direction of the Ross Station Road cabin. Ellis reported to law enforcement that she heard the popping sounds around noon.[15]

Kimberly Crumb has a 1999 Ford Ranger in a color called Harvest Gold. On February 5, 2013, just after noon, Crumb observed a truck similar to his on Highway 116 headed toward Forestville near Ross Station Road. The truck had two occupants and an out-of-state license plate.

Charles Wyatt met Odin around February 2013 in the Sonoma County Jail when they were housed in the same module. According to Wyatt, Odin told him "he was the guy that, in his words, whacked the three victims." Odin said he and Francis planned to commit a robbery and Cappello did not know about their plan. Odin told Wyatt that Cappello was at the hotel at the time of the killings.

In late March or early April 2013, Wyatt sent a letter to the Sonoma County District Attorney's Office to the attention of Traci Carrillo, the deputy district attorney handling the case at the time, reporting that Odin told him details about the murders. He did not receive a response to his letter. No one from the district attorney's office or the Sheriff's Department ever interviewed Wyatt about Odin's jailhouse statements.

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[15] Recall that cell phone evidence and Odin's testimony suggested the shootings occurred at 10:50 a.m. (See fn. 12.) The defense also called as a witness one of the owners of the 10-acre property on which the cabin was located. (Her husband testified for the prosecution that he saw two vehicles enter the property around 10:10 a.m. on the day of the shootings.) This witness testified she left the main house on February 5 around 10:50 a.m. and walked to Ross Station Road to meet a friend who was giving her a ride to a yoga class. She thought her friend picked her up around 11:00 a.m. During the time she waited for her ride, she did not see any cars leaving her property. Later, around 1:30 p.m., she was back in her kitchen when she heard a vehicle on the gravel. She saw a white vehicle leaving from the cabin area. This witness also testified she had "very poor vision" and the farther things are from her the less in focus they are.

Roger Clark testified as an expert in police procedures. He reviewed police reports and interview transcripts from the criminal investigation of this case. He testified that taking more than one reading of the temperatures of victims' bodies can provide evidence about when they died. In this case, the internal body temperatures of the victims were never measured. Clark criticized law enforcement for failing to investigate further into Ellis's report that she heard gunshots at noon and Crumb's report of seeing a vehicle similar to Francis's near the crime scene around noon. He expressed concern about how law enforcement treated Francis, a coconspirator in the case, observing that he was interviewed rather than interrogated. Clark described as a typical investigative technique the practice of leaving coconspirators together and listening in on their conversation remotely, but apparently that was not done here with Odin and Francis. He testified that polygraph examinations are valuable, but apparently no polygraph testing was offered in this case. He criticized law enforcement for failing to test Cappello's clothing (recovered at the side of the road) for gunshot residue.

Clark noted that Odin and his attorney were allowed to watch Cappello's interview by law enforcement. Clark had never seen this before and could not "think of a single productive outcome for anything like that." He criticized law enforcement for failing to interview Wyatt to determine whether he had relevant information on Odin. Finally, he expected further "pursuit of the money trail" than occurred in this investigation.

Jury Verdict and Sentence

The jury found Cappello guilty as charged and found all the special circumstances and firearm enhancement allegations true. The trial court sentenced Cappello to three consecutive terms of life without the possibility of parole (LWOP), plus 100 years to life in prison, plus a determinate sentence of six years, eight months.

DISCUSSION

A. *Admission of Odin's and Francis's Interviews*

After Francis testified, the trial court allowed the prosecution to play, as a prior consistent statement, an audio-recording of Francis's interview with law enforcement conducted soon after he was arrested on February 26, 2013. Likewise, after Odin

testified, the prosecution was allowed to play a video-recording of Odin's interview with law enforcement conducted the same day as a prior consistent statement.

Cappello contends the trial court abused its discretion in allowing Francis's and Odin's interviews to be played for the jury in their entirety. We agree with Cappello that those portions of the interviews that were not relevant to rehabilitate credibility should not have been played for the jury, but he has failed to show prejudice from the error.

1. Admissibility of the Entire Interviews

"To be admissible as an exception to the hearsay rule, a prior consistent statement must be offered (1) after an inconsistent statement is admitted to attack the testifying witness's credibility, where the consistent statement was made before the inconsistent statement, or (2) when there is an express or implied charge that the witness's testimony recently was fabricated or influenced by bias or improper motive, and the statement was made prior to the fabrication, bias, or improper motive. (Evid. Code, §§ 791, 1236.)"[16] (*People v. Riccardi* (2012) 54 Cal.4th 758, 802 (*Riccardi*), abrogated on another point by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216 (*Rangel*).)

After a witness's credibility has been attacked, prior statements made by that witness are admissible to rehabilitate the witness's testimony to the extent those prior statements are *consistent* with the witness's trial testimony. (§§ 791 [prior statement "that is *consistent* with [the witness's] testimony at the hearing" is admissible under

[16] Further undesignated statutory references are to the Evidence Code. Section 1236 provides, "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."

Section 791 provides, "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

certain circumstances (italics added)], 1236 [statement offered in compliance with section 791 is admissible as an exception the hearsay rule "if the statement is *consistent* with [the witness's] testimony," italics added.)

The facts of *Riccardi* are instructive. In that case, witness Marilyn Young testified about the defendant's behavior in the months before he killed his ex-girlfriend Connie and her friend. (*Riccardi*, *supra*, 54 Cal.4th at pp. 765–767, 769–770.) In cross-examining Young, defense counsel attempted to impeach her with her audio-recorded interview with the police, conducted the day after the murders. Following cross-examination, the prosecutor moved to admit the entire audiotape of Young's interview, arguing it was admissible because the defense implied she fabricated her testimony. The trial court allowed the jury to hear the entire police interview. (*Id*. at pp. 798–799.)

Our Supreme Court, however, held "the trial court erred in admitting those portions of the audio-recorded interview that did more than rehabilitate Young's testimony." (*Riccardi*, *supra*, 54 Cal.4th at pp. 799, 803.) The court found that defense counsel's cross-examination of Young suggested she fabricated her trial testimony because she failed to mention important facts in her police interview. "Specifically, defense counsel claimed, in cross-examining Young, that she had never told police that [murder victim] Connie reported hearing a loud bang from her patio the night before her death . . . . Defense counsel also claimed that Young had never told police that defendant threatened Connie that he could hurt her if he wanted to." (*Id*. at p. 803.) Thus, Young's prior consistent statements in her police interview were admissible to refute the defense's suggestion of recent fabrication. (*Ibid*.)

But Young's recorded interview included other statements "that were not part of her trial testimony." (*Riccardi*, *supra*, 54 Cal.4th at p. 799.) For example, in her police interview but not in her trial testimony, Young described the defendant as " 'psychotic' and 'berserk' " and "suggested defendant had 'connections' with 'bad guys' in the criminal 'underworld.' " (*Ibid*.) Young described an incident to the police that she did not mention at trial. As to other incidents that she did testify about, Young provided additional details to the police that she did not mention at trial. (*Id*. at p. 800.) In her

police interview, Young also described stalking incidents involving the defendant that she had not personally observed, and she speculated that the defendant might have followed the victims and "might have seen something that enraged him enough to kill both of them." (*Id*. at p. 801.) The court recognized that Young's prior statements conveying her beliefs about the defendant's criminal associations, her description of incidents she did not testify about at trial, and her speculation about the killings were not admissible to rehabilitate her credibility. (*Id*. at pp. 804–805.) The court explained, "Although portions of Young's audio-recorded statements to the detective were properly admitted to refute defendant's characterization of her testimony, this circumstance does not necessarily establish that the entire recording was admissible." (*Id*. at p. 803.)

In the present case, as in *Riccardi*, defense counsel's cross-examination of the witnesses suggested that they fabricated their testimony. Defense counsel asked Francis about prior statements he made that were inconsistent with his trial testimony. He asked Francis about his proffer to the district attorney's office, implying Francis had a motive to lie then so that he could settle his own criminal case. Defense counsel also elicited testimony from Francis that he and Odin were currently housed in the same module in jail and, in the previous six weeks, they had out-of-cell time at the same time every day, thereby hinting that he and Odin could have recently made up their trial testimony together in jail. Defense counsel took a similar tack in cross-examining Odin. Francis's and Odin's prior consistent statements regarding the crime made on February 26, 2013, were, therefore, admissible to refute the defense claim that they fabricated their testimony.[17]

[17] Cappello argues the Dwyers also had motive to lie at the time of their February 26, 2013, interviews. As our high court responded to a similar argument, "This is no doubt true, but defendant also implied at trial that the plea agreement provided an *additional* improper motive. A prior consistent statement logically bolsters a witness's credibility whenever it predates *any* motive to lie, not just when it predates all possible motives." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 491–492 [rejecting claim that the witness's prior consistent statement was inadmissible because the witness already had a motive to minimize his role in the crime at the time he made the prior statement where prior statement was made before the witness reached a plea bargain]; see *People v. Jones*

But, as in *Riccardi*, this does not necessarily establish that the entire recordings were admissible. (See *Riccardi*, *supra*, 54 Cal.4th at p. 803.) Only those prior consistent statements that were relevant to rehabilitate credibility were admissible.

The Attorney General claims that when cross-examination impugns the witness's overall credibility or alleges recent fabrication or bias, "an *entire* statement is admissible to rebut it." (Italics added.) He cites *People v. Crew* (2003) 31 Cal.4th 822, 843 for this proposition. But *Crew* does not hold an entire prior interview is admissible when there has been a claim of bias or motive to fabricate, regardless of whether the entire interview is consistent with the witness's current testimony. The hearsay exception at issue applies to prior *consistent* statements. (§§ 791, 1236.) The Attorney General offers no authority for the proposition that a witness's hearsay statements that are not consistent with her trial testimony become admissible merely because those statements were made during an interview in which the witness made *other* statements that are consistent with trial testimony.

Accordingly, we agree with Cappello that the trial court erred in admitting the entire interviews without considering which portions were relevant to rehabilitate credibility.[18]

(2003) 30 Cal.4th 1084, 1107 [witness's prior statement to police properly admitted "because it was made before the [witness's] plea bargain was struck and thus before the existence of one of the grounds alleged in defendant's charge that [the witness's] trial testimony was biased" even though the defense argued the witness had another bias or motive to lie at the time he gave the police statement based on fear of prosecution].) Here, prior consistent statements made February 26, 2013, were admissible because they predated Francis's and Odin's plea agreements and predated Francis and Odin having out-of-cell time together in jail.

[18] We note that the trial court ruled Francis's entire interview could be admitted, stating, "I'm just going to let that all in. And if—any 356 arguments I'll say under 352 it will be an undue waste of time . . . ." To the extent the trial court ruled the entire interviews were admissible under section 356, this was error. Section 356 provides that when part of a conversation or writing is given in evidence, another conversation or writing that is " 'necessary to make it understood may also be given in evidence.' " The purpose of this "rule of completeness" is to avoid creating a misleading impression. (*Riccardi*, *supra*, 54 Cal.4th at p. 803, fn. 22.) "It applies only to statements that have

2. Lack of Prejudice

Nonetheless, we need not reverse because Cappello has not shown prejudice. Again, *Riccardi* is helpful to our analysis. There, our high court concluded any error in admitting Young's entire recorded interview with the police—"and not only those statements that refuted defense counsel's characterization of Young's testimony"—was harmless. (*Riccardi*, *supra*, 54 Cal.4th at p. 804 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836–837, the "reasonable probability standard" to the state law error].) The court explained, "Any prejudice from Young's beliefs about defendant's criminal associations, her fear of defendant, and her speculation that the killings were not premeditated, was substantially mitigated by other admissible evidence." (*Ibid*.) "Overall, although Young's audio-recorded statements to Detective Purcell recounted not only additional details concerning defendant's stalking but also included incidents she had not described during her testimony, her statements, viewed in context of the entire guilt phase, *added nothing that was prejudicial to defendant*." (*Id*. at p. 805, italics added.) The additional details in Young's police interview "were cumulative to the enormity of evidence showing that [murder victim] Connie was increasingly afraid of defendant in the week before she was killed." (*Ibid*.)

Here, Cappello claims the interviews contain significant inadmissible hearsay, speculation, and factual assertions that differed from the Dwyers' trial testimony. We conclude the additional details in Odin's and Francis's interviews added nothing that was prejudicial to Cappello.

a. *Odin's Interview*

In his interview, Odin told detectives that after he saw the three victims "dead on the floor," he asked Cappello what happened and Cappello "was like, 'Well, it had to be

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some bearing upon, or connection with, the portion of the conversation originally introduced." (*People v. Samuels* (2005) 36 Cal.4th 96, 130.) But the prosecutor here did not argue Francis's and Odin's entire interviews were admissible under section 356, the Attorney General does not make the argument on appeal, and we do not see how the portions of Francis's and Odin's recorded interviews relevant to rehabilitate them would have created a misleading impression.

done.' " Asked about Cappello's demeanor, Odin said, "His thing was it had to be done. And it seemed like he came prepared to do that, you know, 'cause, you know, a lot of things clicked in to place for me right there. Like, no, maybe we weren't just here moving weed, like I think we to [*sic*] *steal that weed*. . . . " (Italics added.)[19] Later, Odin said the gunshots he heard were "fast" and "it sounded muffled, but it didn't have a silencer or anything. So, I mean, maybe it was just, uh, way [*sic*] the door was to the room that made it sound muffled. . . ." Odin continued, "Maybe he had it *right up against the back of their heads*—I don't know." (Italics added.)

Cappello argues that Odin's interview statements that Cappello was there to "steal that weed" and that he might have put the gun "right up against the back of their heads" were not consistent with Odin's testimony. We discern no prejudice from these statements. Odin may not have testified at trial that he realized after the shootings that Cappello was there to "steal that weed," but this statement adds nothing prejudicial that was not implied by his trial testimony. Odin testified that after the shootings, he said they needed to get out of there, Cappello said, " 'No. Let's get the marijuana,' " and Odin collected the marijuana and put it in Cappello's Bronco. In other words, they stole the weed. Odin's comment that the gunshots may have sounded muffled because the gun was "up against the back of their heads" would not have prejudiced Cappello because his testimony at trial was that Cappello shot the three victims in quick succession and when asked why he did it, Cappello said, " 'It was something that had to be done.' " In this context, Odin's added speculation on *how* Cappello shot the victims would not have affected the verdict. (See *Riccardi, supra*, 54 Cal.4th at p. 828 [no reversal where the defendant "fails to demonstrate that it is reasonably probable his verdict was affected by any evidentiary error"].)

In his interview, Odin said when he and Cappello arrived at the cabin, everyone (presumably referring to Cappello, Klarkowski, Lewin, and Butler) shook hands. But

[19] The phrases in Odin's interview that Cappello identifies on appeal as inadmissible and prejudicial are in italics.

Odin did not shake hands with anyone. He continued, "I was the worker. That's why I said I think that probably [Cappello] told me a different story than really what was going on, and *he was supposed to have money, not just be a transporter. I think he was supposed to be in on the purchase*." (Italics added.) Later, Odin told the detectives, "So what I think happened is that *the night* before [Lewin] gave them a *bunch of money*—[Butler] a bunch of money and so, well, after they looking [*sic*] at all the product, I think [*Cappello*] *was supposed to bring other money with him* and pay, because the way it seem [*sic*]. . . . While I was packaging, showing [Butler] and [Klarkowski] how to package, [Cappello] and [Lewin] were talking . . . about some other logistics about the next run and . . . but there's still like forty eight hundred, or forty eight thousand or something that needs to be on this and that was . . . (unintelligible) . . . very fast by [Cappello] who was like, 'Yeah, yeah, yeah, well we just gotta set this up with Vic and then we'll go back to the hotel room and we'll take care of everything.' So I was under the impression . . . [¶] . . . [¶] . . . is that we *were leaving to go get money to come back to finish paying for the product*." (Italics added.) He said he did not see any money at the cabin at all. Later in the interview, Odin said, "[Cappello] wanted me to sell all, all the pot to pay him for doing that for me. 'Cause that's what he said, he said he did that for me *so I could*, you know, *earn some money*." (Italics added.)

Cappello maintains that Odin's surmise (1) that Cappello was supposed to be in on the purchase and not just the transportation and (2) that Capello wanted Odin to sell the marijuana to make some money was inadmissible speculation. But Odin similarly testified without objection that Cappello and one of the men in the cabin discussed money Cappello still had to bring to the cabin. Odin testified, "Sounded like—they were discussing some money that it seemed like Mr. Cappello still had to bring to the table. He said that he had some money back in the motel room, and he could go and get that real quick." Odin further testified that heard the amount "40 something thousand" discussed, but he did not see any money at the cabin. Odin also testified about Cappello wanting him (Odin) to make money. Odin testified without objection, "[Cappello] said right after the shooting that he wanted $30,000 for each one of those people that he shot

like he was a hitman or something. He didn't say he was a hitman. But he was like—he was like, 'I need 30 grand for each of these people. That's what the normal payment is for something like that. And *I'm doing this to help you and your dad out*.' He knew that we didn't have very much money. He made it seem like even though those people were dead, this was a big payday and we could get wealthy." (Italics added.) Because Odin's complained-of interview statements largely duplicated his trial testimony, their admission was harmless. (See *Riccardi, supra*, 54 Cal.4th at pp. 803–804 [where inadmissible portions of witness's interview "merely duplicated much of her trial testimony," court found error harmless].)

In his interview, Odin told the detectives it was his understanding that Cappello was "ex-military." Odin mentioned "the *black ops thing* that [Cappello] talked about. . . ." (Italics added.) Later, Odin commented that talking to the police (as he was) "doesn't make me safe from, you know, the Hell's Angels . . . ." Odin said he was scared of going to jail "for a shit-load of years" and he was also scared of not going to jail "and having somebody from [Cappello's] family *do a hit on me*." (Italics added.) Odin said Cappello told him he was an Oakland chapter member of the Hells Angels and he had tattoos that looked like club tattoos. Odin told the detectives it seemed like Cappello's family had "got some connections." Odin worked for Mike Cappello and "that's a tight knit family. It's an Italian family. They may have made a shit load of money in like twenty years. They made like *hundreds of millions of dollars*. You *have to know people* to make that money. You, you're not just startin' out of college and goin' and open a business and not having connections and . . . [¶] . . . [¶] . . . people in the pipeline . . . ." (Italics added.) Odin said he had seen Cappello with handguns before. Then he said, "*He's got a hundred semi automatic hand guns* [¶] . . . [¶] . . . the gun safe at his brother's house is fairly large. I, I don't know if they were his guns in there or not, you know. I mean, I just know that *those guys are wealthy and he was in the military and pretty much wealthy military guys usually have a shitload of guns laying around everywhere*. And, that's my experience."

Cappello argues these statements were inadmissible because there was no evidence Odin had personal knowledge about these things. This may be true, but again we fail to see how this could have prejudiced Cappello "viewed in context of" the evidence presented at trial. (See *Riccardi*, *supra*, 54 Cal.4th at p. 805.) Rogers testified that Cappello talked about being in the military. He told her he was special forces and he had killed 11 people in combat. Odin testified that Cappello talked about his military experience. He testified that Cappello implied he was in special forces and showed him an assault weapon, saying it was "his favorite weapon for storming into buildings and stuff." Another witness testified that Cappello told her he served in the marines and learned to make explosives. Rogers testified Cappello talked about being a member of the Hells Angels, and this scared her. She testified Cappello had two Hells Angels rings, he had shown her photographs of himself with other Hells Angels members, and she mentioned a tattoo that caused her to believe he was in the Hells Angels. Odin testified that Cappello mentioned he was involved with the Hells Angels more than once. Francis testified the Hells Angels "have rather long reach if you get them mad at you." Rogers testified that Cappello often spoke about how his family was connected with the Italian Mafia, and this scared her. She testified Cappello told her his family was from Sicily and they owned restaurants that were fronts for the Mafia. Rogers testified she was afraid Cappello's family would come after her and she "went into hiding." Evidence at trial established that Cappello went target shooting with a handgun at his brother's ranch and that an AR-15 rifle, a Saiga semiautomatic shotgun, magazines and ammunition, and a DVD on advanced pistol handling were found in his house. As we explain below (see section C.), all of this evidence was relevant and admissible. Thus, any potential prejudice from Odin's inadmissible interview comments on Cappello's claimed military experience, his association with the Hells Angels, and his claimed family or Mafia connections "was substantially mitigated by other admissible evidence." (*Id.* at p. 804.) Odin's comment that Cappello's family made hundreds of millions of dollars, though inadmissible, is not reasonably likely to have affected the verdict. Nor do we see how Odin's statement that Cappello had "a hundred semi automatic hand guns," followed by

his speculation that Cappello had a lot of guns because it was Odin's "experience" that "wealthy military guys usually have a shitload of guns laying around" would have affected the verdict. The jury would have understood in context that Odin was exaggerating or speculating, and in any event, there is no reasonable probability the jury would have reached a more favorable verdict had it not heard this comment in light of evidence that Cappello was the owner of the Springfield .45 caliber semiautomatic handgun that was the likely murder weapon.

Finally, Cappello notes that Odin said in his interview that the victims "seemed like really nice guys," and defense counsel argued this was "a gratuitous statement that is designed to elicit favorable impressions of the witness." To the extent Cappello now argues this comment was likely to have prejudiced him, we are not convinced. Odin also said of Cappello in his interview, "I mean, I just worked for the guy for two years. I just thought he was a really nice guy." So Odin's initial impression of the victims was no more positive than his view of Cappello after knowing him for two years. Cappello argues the key issue at trial was "the extent to which the jury believed [Odin and Francis], and how they perceived Cappello, who did not testify." Here, the jury observed Odin testify for many hours, and he was subjected to vigorous cross-examination. It is not disputed that at least parts of his interview were admissible, and so the jury permissibly heard those parts of Odin's interview that were consistent with his trial testimony and relevant to his credibility, while also observing his demeanor during the videotaped police interview. We do not see how Odin's comment that the victims seemed nice, or indeed any of his complained-of interviews statements, would have served to prejudicially establish Odin's credibility.

b. *Francis's Interview*

Likewise, any potential prejudice from Francis's inadmissible interview comments "was substantially mitigated by other admissible evidence." (*Riccardi, supra,* 54 Cal.4th at p. 804.) Cappello points out that Francis's interview contained hearsay from Odin about what happened at the cabin. This evidence was mitigated by Odin's trial testimony about what happened at the cabin. Similarly, Francis's interview statements about

Cappello's association with the Hells Angels was mitigated by admissible evidence showing Cappello claimed to be a member of the Hells Angels.

Cappello also complains that Francis's interview contained rampant speculation, but heard in context, the jury would have recognized those comments that were speculation and, in any event, we cannot say on balance Francis's comments were prejudicial to Cappello.[20] Francis, like Odin, testified at trial and was subjected to vigorous cross-examination. The jury permissibly heard those parts of his interview that were consistent with his trial testimony and relevant to his credibility. Cappello does not explain how the admission of Francis's entire interview caused him prejudice.

c. *Conclusion*

We agree with Cappello that a crucial issue at trial was whether Odin and Francis were credible, but Cappello has failed to demonstrate the admission of the inadmissible portions of the police interviews could have affected the jury's assessment of the Dwyers' credibility to his prejudice. The Attorney General notes that, after a two-month trial, the jury deliberated for just one day, suggesting "the jury had little trouble deciding who to believe." If, after observing Odin's and Francis's trial testimony and considering the corroborating evidence[21] (including the admissible portions of their police interviews), the jury was unsure of Odin's and Francis's credibility, we cannot discern

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[20] For example, Francis said in his interview, "I expect that [Cappello] was paid to shoot this gangster guy. You know, 'cause he kept rambling on, 'Oh, he's a fuckin' rapist,' and all this. Well, I don't care if the guy is a rapist. He probably should a been killed then, but not by me." This comment attacked the victim, not Cappello.

[21] Odin's testimony about Cappello disposing of the gloves, the vinyl bra on his Bronco, and his clothes was corroborated by physical evidence of those items recovered by the law enforcement. His testimony that he and Cappello followed Lewin and Klarkowski to the cabin was corroborated by the property owner's testimony that he saw a dark colored passenger vehicle followed by a white SUV driving to the cabin on the morning of the killings. His testimony that the gun parts he threw in the creek belonged to Cappello was corroborated by testimony from the registered owner of the gun that he sold it to Cappello in 2009. His testimony that Cappello shaved his beard after the killings was corroborated by testimony from other witnesses that Cappello had a beard on February 4 and was clean shaven when he returned to Colorado on February 6.

how the inadmissible portions of their police interviews would have caused the jury to find Odin and Francis credible. Therefore, we conclude it is not reasonably probable that the trial court's error in admitting the Dwyers' entire interviews affected the verdict.

B. *Detective Cutting's Testimony on the Dwyers' Credibility*

Cappello contends the lead detective on the case, Brandon Cutting, improperly vouched for the credibility of Odin and Francis and defense counsel denied him effective assistance of counsel in failing to object to this testimony.

1. Background

As we have seen, part of the defense was criticizing the investigation of the case. In his opening statement, defense counsel suggested detectives were unjustifiably credulous of the Dwyers' version of events. He told the jury, "Instead of considering the possibility Francis Dwyer and Odin Dwyer were involved in shooting the victims and instead of investigating whether the Dwyers had any credibility, detectives in this case began to instead build the Dwyers' credibility or attempt to do so."

The defense called Cutting as a witness, focusing on how he determines a witness's credibility in general and how he investigated the Dwyers' statements in particular. Defense counsel asked Cutting who he had interviewed "to determine whether or not Odin Dwyer was credible." Cutting responded that he began with Odin's statement that they left Colorado for California at a certain time. Cutting reviewed evidence that showed Odin was telling the truth about the time. Defense counsel repeated his question, and Cutting answered, "Everybody I interviewed in this case goes to the credibility of everybody else. That was sort of the totality of what we did." Cutting explained that he talked to people who knew Odin "[t]o determine whether he was telling me the truth about his statements."

Given the drift of direct examination, the prosecutor in cross-examination tried to show that Cutting reasonably investigated the case based on the evidence and that law enforcement did not rush to believe Odin and Francis as suggested by defense counsel. The prosecutor asked what it meant when a suspect's statement was corroborated by physical evidence. Cutting answered, "Well, it *lends credibility to the statement*. It's one

tool to determine that what they're telling me is the truth. When you're piecing things together, you are trying to create a total package picture and understand it. Everybody's statements and everything that you can corroborate or put truth to or put a fact to, those are pieces that help build credibility." (Italics added.)[22]

The prosecutor asked if Cutting immediately accepted as true what Odin said on February 26, 2013. Cutting responded, "Absolutely not. But I did test it. We continued to ask questions. . . . [¶] I'm in a business where you don't believe people typically. It's a skeptical business being in law enforcement. So you typically don't believe people first, and then you have to sort of start to develop belief in what they're saying either based on the facts that they've just given you, based on time lines that you can prove, something. There needs to be something there. And *ultimately we got to that point*. But not initially." (Italics added.)

Cutting further explained that corroborating a witness's statement is "[v]ery important." "Like I said, . . . being in law enforcement, you tend to not believe people. People generally give you a misstatement because they're hiding something. The more statements that are the same, or consistently the same, you begin to understand that those are the parts of that that are the truth. It's the corroborated truth versus the statement of, 'I did this.' Somebody else say, 'He did this at this time.' You know, it makes sense. And *it becomes believable*. And then you have to use other tools to prove those believable statements to be the truth. It goes step by step." (Italics added.)

Cutting testified he was able to find physical evidence to corroborate Odin's version of events such as surveillance video tape, a Target receipt for the rubbing alcohol purchased on the day of the murders, and the evidence found when he and Odin drove around looking for items Odin said Cappello got rid of after the shootings (vehicle bra, clothes, nitrile gloves). The prosecutor asked whether Cutting found any physical

[22] The parts of Cutting's testimony that Cappello now claims amount to improper vouching are in italics.

evidence that was inconsistent with what Odin told him, and Cutting said no.[23] The questioning continued.

"Q *So all the physical evidence that you collected corroborated him. Is that what you're saying?*

"A *Yes.*

"Q *And the same with Francis?*

"A *Yes.*

"Q So you were trying to prove or disprove Francis's statement as well?

"A Everybody's statement. Yes."

Asked about percipient witnesses in this case, Cutting testified, "So I don't have a lot of people that provided perception into what was taking place other than—my interviews with Odin were very specific about what took place in that house. *Odin provided me statements that I could prove to be truthful in all other aspects of this incident*, from the time they left Colorado, actually prior to, from the time they left Colorado to the time that he was caught. The statements that he made to us we were able to prove to be, based on the —I don't know if we broke down every little piece of what he said, but the ones relevant to this case, we were able to identify and show some form of evidence towards that. [¶] . . . *[T]he statements he made I was able to put facts to at least some reasonable evidence towards that to say that is a truthful statement*." (Italics added.)

The prosecutor followed up on defense counsel's question about investigating the backgrounds of the Dwyers such as where they lived when Odin was a child. Cutting responded that the Dwyers' family history was not relevant to the case. He continued, "We did have some evidence. He stated where he lived. I didn't have anything to

[23] There were some facts provided by the Dwyers that law enforcement could not corroborate or disprove. For example, Cutting tried to obtain surveillance video or other evidence from the hotel in Santa Rosa where Cappello stayed to corroborate or disprove the Dwyers' claim that Francis was in the hotel room during the shootings, but no such evidence was available.

disbelieve what he said. So did it go to his credibility? He told me about some places that he lived that I knew he had been based on records reviews of him. So that in and of itself was a credibility builder. *I didn't hear anything that made me say not truthful or something that made me skeptical about what he was saying*." (Italics added.)

2. Analysis

Cappello claims the italicized testimony from Cutting was impermissible "vouching." He relies on the rule, "Lay opinion about the veracity of particular statements by another is inadmissible on that issue." (*People v. Melton* (1988) 44 Cal.3d 713, 744 (*Melton*).) This claim is forfeited because defense counsel failed to object during Cutting's cross-examination (§ 353), and, in any event, we conclude there was no prejudicial error.

First, we agree with the Attorney General that defense counsel opened the door to the prosecutor's questions about the reasons Cutting found the Dwyers credible. The implication of defense counsel's questioning was that Cutting failed to investigate the Dwyers and simply accepted their statements as true. The prosecutor's questions and Cutting's responses were, therefore, relevant to an issue raised by the defense, that is, whether the investigation was thorough and fair.[24] (See *People v. Wharton* (1991) 53 Cal.3d 522, 595 ["the prosecutor was allowed to explore implications raised by defendant on direct questioning"].) Further, while a witness's lay opinion of another's credibility is generally inadmissible because it is irrelevant (*Melton, supra,* 44 Cal.3d at p. 744), evidence of specific instances of a witness's past reliability is relevant to the witness's credibility and is, therefore, admissible (*People v. Harris* (1989) 47 Cal.3d 1047, 1081

[24] This is distinguishable from cases that have held opinion testimony on the credibility of another witness is inadmissible because it is not relevant to any issue at trial. (Cf. *People v. Sergill* (1982) 138 Cal.App.3d 34, 40 ["officers' opinions on the child's truthfulness during their limited contacts with her did not have a *reasonable* tendency to prove or disprove her credibility and were therefore not relevant"].) Given the defense theory of a flawed investigation, Cutting's testimony was relevant to explain his investigation steps and to rebut the defense's suggestion that he believed the Dwyers without reason.

(*Harris*)). Here, the prosecutor did not solicit Cutting's unsupported opinion that the Dwyers were generally credible witnesses. Rather, he asked about Cutting's investigation, and Cutting reasonably explained that the discovery of corroborating evidence led him to believe Odin and Francis were telling the truth more generally.

Second, even assuming Cutting's testimony in cross-examination was inadmissible, there was no prejudice because defense counsel elicited from Cutting similar testimony in direct examination that he assessed the credibility of every witness based on whether the witness's statement was consistent with other evidence, and that evidence in this case corroborated Odin's statements, making him seem truthful.[25] We fail to see how the complained-of cross-examination testimony could have harmed Cappello since it merely elaborated on a theme introduced by defense counsel, namely, that the Dwyers became more credible to Cutting as he found more evidence corroborating their statements.

Moreover, Cutting's testimony indicating that he generally believed the Dwyers' version of events "did not present any evidence to the jury that it would not have already inferred from the fact that [Cutting] had investigated the case and that [Cappello] had been charged with the crimes." (*People v. Riggs* (2008) 44 Cal.4th 248, 300 (*Riggs*).) There was no implication from the prosecutor's questions or Cutting's answers that Cutting's determination that the Dwyers were generally truthful about the crime was based on evidence not presented to the jury. (See *ibid*.) "The jury's exposure to the unsurprising opinions of the investigating officer that he believed the person charged with the crimes had committed them . . . could not have influenced the verdict." (*Id*. at pp. 300–301.)

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[25] For example, defense counsel elicited Cutting's response that he reviewed evidence showing Odin "*was telling me the truth* about when he left [Colorado]." (Italics added.) He further testified he talked to people who knew Odin "[t]o determine whether he was telling me the truth about his statements." Cutting explained, "Everybody I interviewed in this case goes to the credibility of everybody else. That was sort of the totality of what we did."

Because Cutting's cross-examination testimony was harmless, Cappello's claim of ineffective assistance of counsel for failing to object to the testimony also fails. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 414–415 (*Ochoa*).)

C. *Admission of Assertedly Improper Character Evidence*

Cappello contends the trial court improperly admitted evidence showing (1) he associated with the Hells Angels, (2) he possessed guns, firearm and military paraphernalia, and other weapons, and he claimed to have specialized military experience and training, (3) he was involved in the drug trade beyond transporting marijuana, and (4) he made threats or behaved boorishly in the past. We find no prejudicial error.

1. Hells Angels

a. *Background*

In a motion in limine, the prosecution sought admission of evidence that Cappello claimed association with the Hells Angels, asserting the evidence showed Cappello "used his association to intimidate others . . . and to cause them to do things they wouldn't normally do and to refrain from implicating him in these and other crimes." The prosecution argued the evidence was not intended as character evidence but was relevant for its effect on the listeners to explain their behavior and bolster their credibility. Cappello argued there was insufficient evidence he was associated with the Hells Angels, and the evidence was more prejudicial than probative. The trial court ruled witnesses would be permitted to testify they were fearful "based on their belief that Mr. Cappello is a Hells Angel" because this information was relevant and not unduly prejudicial.

When Rogers testified on direct examination, she admitted she did not tell the truth in her first interview with the police on February 13, 2013. Cappello had not been arrested then, and Rogers testified she lied because she "really was more afraid of [Cappello] at that point than . . . of the police." Later, she "completely came clean" in an interview with district attorney investigator Tim Dempsey conducted October 15, 2015.

Before the prosecutor asked Rogers why she was afraid of Cappello, the trial court gave the jury a limiting instruction as follows: "The testimony that you hear, if you hear about certain groups, is not offered to prove that Mr. Cappello actually belonged to those

groups but only to explain the state of mind and the conduct of the witness. It's not to prove that he belonged to those groups. It's just to explain the state of mind and conduct of the witness in this case."

Rogers then testified that when she began dating Cappello, he talked about being a member of the Hells Angels and showed her some Hells Angels jewelry and this caused her concern or fear.[26] Rogers received financial assistance from the Sonoma County District Attorney's Office for relocation and living expenses and she had received $12,900 so far.

In cross-examination of Rogers, defense counsel attacked her credibility in various ways. For example, defense counsel implied Rogers changed her story to receive a financial benefit by eliciting testimony that she was not completely truthful with law enforcement on three separate occasions before she finally "came clean" with Dempsey in October 2015, which was also the first time witness relocation reimbursement was ever discussed. Rogers testified in direct examination that she stopped writing Cappello letters in May 2013, but in cross-examination, she conceded that she continued to send him letters and cards into February 2014.

The prosecutor sought to rehabilitate Rogers's credibility and "the reasonableness of her fear" with additional questions about the basis for her belief that Cappello was associated with the Hells Angels. Asked what caused her to believe Cappello was associated with the Hells Angels, Rogers responded that she had seen several pictures at his house showing him with friends with leather jackets on and Hells Angels patches. In further redirect, Rogers identified four photographs that Cappello had shown her in either late December 2012 or early January 2013. The photos apparently showed Cappello with others in Hells Angels shirts or jackets. Cappello told Rogers he belonged to a Brazilian

[26] In addition, when Rogers first met Cappello, he often spoke about his family's affiliation with the Italian Mafia and how his family was from Sicily, and this scared her. Even after Cappello was arrested, Rogers was afraid his family would come after her and she eventually "went into hiding."

chapter of Hells Angels, and as to one of the photographs, he told her it was taken at the clubhouse in Brazil.

b. *Analysis*

Section 1101, subdivision (a), "prohibits the admission of character evidence *if offered to prove conduct* in conformity with that character trait, sometimes described as a propensity to act in a certain way." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 405–406, italics added.) In this case, however, the evidence Rogers believed Cappello was affiliated with the Hells Angels was not offered to prove he was a member of the Hells Angels and therefore had a propensity to act in a certain way on February 5, 2013. Instead, the evidence was offered and admitted for the purpose of supporting Rogers's credibility by showing a reasonable basis for her fear of Cappello. (See *People v. Stern* (2003) 111 Cal.App.4th 283, 296–299 (*Stern*) [evidence of uncharged conduct by the defendant was admissible as relevant to the credibility of a witness; section 1101 did not apply].)

"Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact or consequence, including evidence relevant to the credibility of a witness. [Citations.] Thus, ' "[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court." ' " (*People v. Abel* (2012) 53 Cal.4th 891, 924–925 (*Abel*).)

In *People v. Hayes* (1999) 21 Cal.4th 1211, 1262 (*Hayes*), for example, one prosecution witness testified the defendant told her he was connected with the Mafia, Teamsters, and CIA, and another witness testified the defendant said the Mafia would watch her and kill her if she used drugs or drank alcohol. Our Supreme Court explained this evidence—that the defendant "claimed to have underworld connections and other relationships to powerful persons"—was not character evidence; it was evidence relevant "to establish the effect of the statements on [the witnesses], not to suggest that appellant

was actually a member of or had connections to the Mafia, CIA, or Teamsters. The jury would have understood this." (*Id*. at p. 1263.)

The defendant in *Hayes* argued the probative value of the evidence was outweighed by its prejudicial impact, but our high court found no abuse of discretion in the trial court admitting the evidence over the defendant's objection under section 352. The court concluded, "Absent an understanding of the relationship between [the two prosecution witnesses] and [the defendant], and the women's reasons for continuing the relationship, a jury might well have considered the testimony of [the witnesses] about the murders . . . and the testimony about [defendant's] planning for and participation in those murders incredible. The evidence was relevant and did not threaten undue prejudice to [the defendant] on the grounds now asserted." (*Hayes, supra,* 21 Cal.4th at p. 1263.)

Similarly, in the present case, evidence that Cappello told Rogers he was a member of the Hells Angels and she believed him because he had indicia of association with Hells Angels was admissible as relevant to explain her fear and support her credibility (*Abel*, *supra*, 53 Cal.4th at pp. 924–925) and to explain why she would have lied to the police initially (*Hayes, supra,* 21 Cal.4th at p. 1263). The jury would have understood the limited purpose of the evidence because the trial court specifically instructed that the evidence was *not* offered to prove Cappello belonged to the Hells Angels; it was offered "*only* to explain the state of mind and the conduct of the witness." (Italics added.) "We presume the jury followed the trial court's instructions." (*People v. Edwards* (2013) 57 Cal.4th 658, 723.)

Finally, we see no abuse of discretion in the trial court overruling Cappello's objection under section 352. The evidence was relevant to Rogers's credibility and to explain her conduct, and the limiting instruction mitigated any potential prejudice.[27]

[27] The parties' motions in limine mentioned affiliation with the Hells Angels, not the Mafia, and in Cappello's opening brief discussion of asserted improper character evidence, he challenges only the admission of evidence about the Hells Angels, not the Mafia. We observe that the same analysis applies to Rogers's testimony that Cappello said his family was in the Mafia and that she was afraid of him for that reason. This was relevant to support her credibility, not as character evidence.

2. Firearms, Paraphernalia, Knives, and Claims of Military Experience

Next, Cappello challenges the admission of evidence of Cappello's ownership of guns, knives, and gun and military paraphernalia and his reference to military service.

a. *Procedural Background*

In motions in limine, the prosecution sought admission of (1) evidence of all items found in Cappello's house, including a hunting knife, a bag containing AR 15 accessories, a tactical vest, a "Saiga 12 gauge shotgun with loaded 12 shot magazine attached," a .223 rifle, a .30 rifle, various ammunition and magazines, a silencer, and a rifle sight (Motion in Limine No. 56), and (2) evidence that Cappello talked to Odin and Francis about his military experience, intimating he was a Navy Seal and had special military training, and that he showed them a Saiga 12 gauge assault-type shotgun (Motion in Limine No. 51). The prosecution argued the evidence regarding the Saiga shotgun and claimed military service was relevant to establish Cappello "sought to intimidate and impress" Odin and Francis.[28]

At a hearing on the motions, the prosecutor further argued, "the sophistication of the items found at his house" was "highly probative as to whether he was physically and mentally capable of actively shooting three individuals in rapid succession without a miss with one bullet to a person's head from a distance of maybe 10 or at most 15 feet. It's hard to do and these . . . items indicate an interest in and a level of sophistication with firearms of all kinds."

Over defense counsel's objection, the trial court granted the prosecution's Motion in Limine No. 51, explaining, "This goes to the basis for credibility of the witnesses and their testimony and if they worked for him and why." The court also allowed the prosecution to introduce evidence of the items seized from Cappello's house (Motion in

[28] The prosecutor argued that, together with evidence that Cappello, as their employer, "exercised control over their daily work and income," evidence about the assault shotgun and military experience helped explain Odin's and Francis's behavior before and after the murders.

Limine No. 56). The court found the evidence more probative than unduly prejudicial but did not state its reasoning.

b. *Trial Testimony and Evidence*

At trial, Odin testified that Cappello showed him a Saiga shotgun and a PS9 rifle. Odin testified the Saiga shotgun was an assault weapon and the other rifle looked like a "military issued weapon." Odin found Cappello's possession of these weapons "concerning a little bit" because "you can't buy those weapons at a regular gun show." Odin testified Cappello would talk about his military experience and implied he was in special forces and when Cappello "brought that shotgun out, he said he liked it specially because it was a close combat, close quarters weapon. It was his favorite weapon for storming into buildings and stuff."

Francis testified that Cappello showed him the Saiga shotgun when he was at Cappello's house digging a ditch with Odin. Cappello told them "he had a lot of ammunition for it, different kinds of ammunition."

Rogers testified that Cappello kept a handgun in his Bronco underneath the driver's seat and he kept a knife on the driver's side seatbelt clasp. Cappello's ex-girlfriend Donna Leonardi also testified Cappello carried a handgun. Leonardi recalled target shooting with Cappello at his brother's ranch using the handgun. Cappello was "[w]ay more accurate" than she was, and he showed her how to hold the gun and focus on the target. Cappello told Leonardi he had served in the marines, he learned to make explosives, and he was "special trained."

A Boulder Colorado police officer testified about items found in a search of Cappello's house conducted February 13, 2013. He found a knife on top of a gun safe, AR-15 accessories (a pistol grip and foregrip), a tactical vest, a ballistic vest, tactical webbing, loaded AR-15 rifle magazines, a drum magazine for a shotgun, shotgun shells, 12-shot shotgun magazines, boxes of shotgun cartridges, rifle slugs for a 12 gauge shotgun, .223 ammunition, an AR-15 rifle, Hornady brand .223 caliber rounds that could be fired through the rifle, a Saiga semiautomatic shotgun with a holographic sight, a

suppressor (often referred to as a silencer) for an AR-15 rifle, and a DVD called "American Rifleman" "Advanced Pistol Handling"

c. *Analysis*

Cappello argues the evidence about Cappello's weapons and claimed military experience was inadmissible character evidence. He relies on *People v. Barnwell* (2007) 41 Cal.4th 1038, 1056, in which the California Supreme Court observed, "When the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons." In *Barnwell*, the trial court ruled that evidence that the defendant had "possessed another handgun similar to the murder weapon" was relevant because it "demonstrated his 'propensity to own or carry that type of weapon.' " (*Id*. at pp. 1055–1056.) This was error because propensity evidence is generally inadmissible under section 1101, subdivision (a). (*Id*. at p. 1056.)

Barnwell is easily distinguished from this case because the challenged evidence here was not admitted to show Cappello had a propensity to carry weapons. The question then is whether the challenged evidence was admissible for some other purpose. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1249 [" 'when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible' "].)

As we have seen, uncharged conduct may be admitted if it is relevant to the credibility of a witness. (*Stern*, *supra*, 111 Cal.App.4th at pp. 298–299.) The trial court ruled the evidence that Cappello talked to the Dwyers about his military experience and showed them a Saiga 12 gauge shotgun was relevant to the Dwyers' credibility, presumably agreeing with the prosecutor's position that the evidence was relevant to show the power dynamic between Cappello and the Dwyers, who worked for him as day laborers. We see no abuse of discretion in this finding. (See *id*. at p. 299 [reviewing trial court's finding of relevance of evidence for abuse of discretion].) The evidence was

relevant to show fear from Odin (who found the shotgun "concerning") and to explain why Odin and Francis would have done what Cappello told them after the shootings.[29]

At trial, the prosecutor asked a detective about the "level of difficulty that is involved in shooting three shots at three live individuals and hitting each in the head" as happened in this case. The detective responded it could be done, but "[i]n real life, . . . to make accurate shots in a very stressful situation, those types of shots can become very difficult. And you have to have some level of training to be able to accurately shoot three head shots." He further testified that any firearms training, "whether it's rifle training or pistol training," "is going to increase your odds of being able to make those [shots]."

In light of the detective's testimony, evidence about target shooting was admissible because it was relevant to show Cappello was more likely to have the skills and ability necessary to commit the triple murder in this case. (See § 1101, subd. (b) [other acts evidence admissible when relevant to show some fact such as opportunity, plan, knowledge, identity].) Similarly, the DVD on "Advanced Pistol Handling" was relevant and admissible because it suggested Cappello studied handling a pistol. And we conclude it was not an abuse of discretion for the trial court to find the other firearms, ammunition, and paraphernalia found in Cappello's house relevant, too. As the Attorney General argues, this evidence "made it more likely [Cappello] had a wide range of shooting experience" and, thus, was more likely to "belong[] to that small category of people skilled enough to carry out the shooting." (Cf. *People v. Jablonski* (2006) 37 Cal.4th 774, 822 (*Jablonski*) [no abuse of discretion in admitting evidence that the defendant possessed a stun gun, which "was not admitted to prove disposition but to prove preparation"].)

We also find no abuse of discretion in the trial court ruling the foregoing evidence was not inadmissible under section 352. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 144–146 [applying an abuse of discretion standard to review a trial court ruling on the

[29] And Leonardi's testimony that Cappello talked about being in the military and having special training was relevant because it tended to corroborate the Dwyers' testimony on this point.

admissibility of evidence under section 352].) " 'Evidence is substantially more prejudicial than probative . . . [citation] [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' [Citation.] ' "The prejudice which . . . Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." ' [Citations.] The potential for such prejudice is 'decreased' when testimony describing the defendant's uncharged acts is 'no stronger and no more inflammatory than the testimony concerning the charged offenses.' " (*Id*. at p. 144.) Here, the evidence that Cappello possessed firearms, ammunition, and paraphernalia was not so inflammatory that jurors would be inclined to punish him with three convictions of first degree murder regardless of whether he was proven guilty beyond a reasonable doubt. Accordingly, the trial court was not required to exclude the evidence under section 352.

We are left to consider Rogers's testimony that Cappello kept a handgun and knife in his Bronco, Leonardi's testimony that Cappello carried a handgun, and evidence that a knife was found in Cappello's house. Arguably, given that the murder weapon was a handgun, Roger's and Leonardi's testimony that Cappello possessed a handgun of unidentified type and caliber was evidence he "possessed a gun that might have been the murder weapon." (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1052) Even if Cappello's prior possession of a handgun were deemed irrelevant, however, admission of the handgun and knife evidence was harmless.[30] Cappello argues the evidence risked tempting jurors to punish him for his criminal proclivities, but Cappello does not claim possession of a handgun or knife was illegal in Colorado, and Rogers testified that the handgun and knife didn't strike her as odd "because up in the mountains, just about everybody does carry weapons in their vehicles." And, as we have seen, evidence that

[30] The Attorney General does not explain how the knife evidence was relevant, and since Rogers did not testify the knife in Cappello's Bronco caused her fear, we assume the knife evidence was not relevant and was therefore inadmissible.

Cappello engaged in target shooting with a handgun was properly admitted.[31] Moreover, the jury heard evidence that Cappello bought a Springfield .45 caliber semiautomatic handgun in 2009. Under these circumstances, it is not reasonably probable the verdict was affected by the admission of evidence that Cappello possessed a handgun and a knife.

3. Unlawful Drug-related Activity

The prosecution sought admission of evidence of drug dealing by Cappello other than transportation of marijuana. The prosecution argued the evidence of Cappello's other drug activities was relevant to counter the defense that Cappello was merely an "enzymer" or "transporter" (not a drug dealer) and to show motive and intent to possess marijuana for sale or transport. Over defense counsel's objection that it was irrelevant and designed to smear Cappello's reputation, the trial court allowed the evidence, finding its probative value outweighed the risk of undue prejudice without further explanation.

At trial, Kear testified Cappello sold him between 100 and 500 Valium pills. He also testified that Cappello and Klarkowski mentioned something about heroin and cocaine but they never followed through. Leonardi testified Cappello once told her he was going to Cuba to talk to people about selling heroin and also at some point told her he was talking to Dings about selling pain medicine that he (Cappello) brought from New Mexico. In addition, the jury heard testimony that a large number of hydrocodone and Ambien pills were found in the search of Cappello's house and that these medications are sold illegally.

Cappello argues the trial court abused its discretion in admitting this evidence because its impact "was simply to portray Cappello as a large scale criminal drug dealer, who was likely to commit other crimes." We are not persuaded.

[31] Further, evidence was presented that Francis, whom the defense suggested may have been the actual shooter, possessed firearms (a .22 pistol, a .22 rifle) at the time of his arrest and previously owned a .44 magnum handgun, a Charles Daly shotgun, and an M1 Garand rifle. We see little risk the jury would have determined that Cappello (and not Odin or Francis) was the shooter based on evidence Cappello possessed firearms that were not the murder weapon when the evidence showed Francis also possessed firearms.

"In prosecutions for drug offenses, evidence of prior drug use and prior drug convictions is generally admissible under Evidence Code section 1101, subdivision (b), to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs." (*People v. Williams* (2009) 170 Cal.App.4th 587, 607.) The evidence of Cappello's drug dealing, therefore, was admissible here to establish motive and intent for count 5, conspiracy to commit possession of marijuana for sale and sale or transportation of marijuana.

We find no abuse of discretion in the trial court finding the evidence more probative than unduly prejudicial under section 352. The evidence that Cappello sold prescription pills and was interested in selling other illegal drugs was not inflammatory compared to the three special circumstances first degree murders he was charged with. And given that all the victims, many of the witnesses, and codefendants Francis and Odin (whom the defense argued were the true culprits) were also involved in the illegal drug trade, the possibility that evidence of Cappello's involvement in additional illegal drug dealing would evoke an emotional bias in the jury is greatly diminished.

And, assuming it was error to admit evidence of Cappello's other non-marijuana drug activity and interests, we conclude the error was harmless. It is not reasonably likely the challenged evidence affected the verdict in light of the fact the victims and primary prosecution witnesses were also involved in the illegal drug trade.

4. Threatening Incidents and Boorish Behavior

a. *Threatening Dings's Girlfriend*

The prosecution moved in limine to admit evidence that Cappello threatened to drown Dings's girlfriend.[32] Defense counsel objected that this was inadmissible

[32] The prosecutor argued this evidence was relevant and admissible to show (1) Cappello was actively engaged as a drug trafficker and dealer for several years, (2) the extent of Cappello's relationship with long-time drug dealer Dings, and (3) "motive and intent to kill if necessary to successfully carry out his drug deals." He argued it was also relevant to explain witnesses' fear of Cappello (referring to Rogers, Odin, and Francis). And he argued the evidence was relevant to rebut the likely defense that Cappello was

character evidence. The trial court ruled the evidence was relevant and not inadmissible under section 352.

At trial, Kear testified that Cappello told him about an incident in Arizona with Dings and his girlfriend Samantha. Cappello told Kear that he said "if Samantha didn't shut her mouth, he was going to drown her in the pool." That was the extent of Kear's testimony on the incident.

Dings testified about the same incident. He said that Cappello gave Samantha 15 or 20 Valium pills and she became "out of control" and "[l]ike a monster." According to Dings, Cappello had loaded his trailer with marijuana for transport when Samantha "start[ed] yelling about telling the border patrol about our vehicle." Dings testified that Cappello said, " 'Listen, man, you know what, I'm going to drown your girlfriend in the swimming pool.' " Dings took this as Cappello "just posturing in front of his girlfriend," and Dings also thought Cappello "voiced something that we all . . . to one degree or another felt."

We are not convinced the evidence of this incident was relevant for the reasons suggested by the prosecutor and the Attorney General. At best, the fact that Cappello told this story to Kear might be relevant to Kear's fear of Cappello. But Kear's testimony was not relevant to Rogers's, Odin's, or Francis's fear because there does not appear to be any evidence that any of them knew about this incident. And we do not understand how the evidence could have been relevant to Cappello's motive and intent in the current charges either.

Nonetheless, we discern no prejudice from Kear's testimony. Cappello argues the "only real effect of this evidence was to try to paint Cappello as a dangerous, violent person capable of killing." But Kear was not present when Cappello "threatened" Samantha. Dings, who was present, explained Samantha was generally in the wrong, Cappello only said something everyone was thinking, and Dings understood Cappello's

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not involved in drug deals, that he would just show up after a transaction was complete to spray his enzyme.

words as posturing, not a serious threat. Given Dings's testimony on the incident, there is no reasonable probability this evidence affected the verdict.

b. *Threatening Dings*

Kear testified Cappello told him Dings owed him a lot of money, Cappello threatened to "take everything [Dings] had," and this kind of talk from Cappello scared Kear. Defense counsel did not object to this testimony.

Asked why he was scared, Kear responded, "Because I never saw that side of him. He was always a nice, you know, person, and you know, seemed—seemed like a decent—decent person to me." Kear continued, "But then when he wasn't getting paid, it was like . . . something trigger switched [*sic*] or something. I'm not really sure." At this point, defense counsel objected and moved to strike based on section 1101, and the trial court overruled the objection.

Kear then testified that Cappello told him "he smashed [Dings's] window in, his driver's side, with a crowbar. [¶] And then I called [Dings] and I said, 'What's going on?' [¶] And he said, 'No, he came up and gave me a hug.' [¶] I thought that was very odd too. So these things started happening. And it really kind of triggered in my head that—that something is not—something is not right."

The Attorney General argues Cappello has forfeited his appellate claim because he failed to object to Kear's testimony about smashing Dings's window. But even assuming the claim was preserved, Kear's testimony appears relevant to explain why Cappello scared Kear. It would not have been abuse of discretion for the trial court to find the evidence more probative than unduly prejudicial.

In any event, the evidence was harmless. Dings testified that Cappello did not break his windshield and did not smash his truck. He testified, "I actually remember the time when I saw [Cappello] at that point. . . . We actually had like a friendly exchange as we usually did." There is no reasonable probability evidence that Cappello made an empty threat against Dings affected the verdict.

c. *Cappello's Driving Trip with Leonardi*

Leonardi worked as a driver for Dings transporting marijuana across state lines. She dated Cappello from March 2010 to January 2011, and Cappello met Dings through her. Leonardi testified that in January 2011, she and Cappello drove to New York in Cappello's white Bronco with a "horse trailer full of weed." She testified that he never let her drive.

Leonardi testified that Cappello would not stop when she asked to stop for coffee and for a bathroom. After they arrived in New York, Leonardi refused to ride back with Cappello and flew home instead. She testified Cappello "was a very different person on that trip. He—he was very controlling, bossy, didn't ask for my opinion on anything and—and took control over the whole situation."

Cappello argues this evidence was irrelevant, and the Attorney General responds it was relevant evidence of modus operandi under section 1101, subdivision (b), and was relevant "to rebut his defense theory that Odin and Francis hatched a secret plot to steal the marijuana and kill the victims."

We have some difficulty understanding how Cappello's controlling behavior with Leonardi would be relevant to rebut a defense theory that the Dwyers planned to steal marijuana without Cappello's knowledge. But any error in admitting this testimony was harmless. We agree with the Attorney General "there is no possibility that the jury convicted Cappello of multiple murders because he was a boor."

D. *Exclusion of a Defense Psychological Expert*

Months before trial started, the defense retained Randall Smith, Ph.D., as a psychological expert. Smith interviewed Cappello and administered tests. The defense wanted Smith to testify that, based on his evaluation and testing, it was his expert opinion that Cappello lacked a propensity for violence. Despite the requirement of reciprocal discovery in criminal cases (Cal. Const., art. I, § 30, subd. (c); Pen. Code, § 1054 et seq.; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 364) and two trial court orders instructing the defense to provide the prosecution any reports of expert witnesses, however, defense counsel withheld Smith's test results until after the prosecution rested

its case. The prosecution moved to exclude Smith's testimony, and the trial court granted the motion, finding the defense had intentionally violated its statutory obligations and a court order and that no lesser sanction could remedy the prejudice to the prosecution caused by the discovery violation.

Cappello claims the trial court erred in excluding Smith's testimony. We disagree.

1. Discovery Obligations

Penal Code section 1054.3, subdivision (a)(1) requires the defense to disclose to the prosecution "[t]he names and addresses of persons, . . . [the defendant] intends to call as witnesses at trial, *together with* any relevant written or recorded statements of those persons, or reports of the statements of those persons, including *any reports or statements of experts made in connection with the case*, and *including the results of* physical or *mental examinations*, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial." (Italics added.)

"The requirement that the defense timely disclose persons whom it 'intends to call as witnesses at trial' applies to ' "all witnesses it reasonably anticipates it is likely to call." ' " (*Riggs*, *supra*, 44 Cal.4th at p. 305.)

The requirement to disclose reports and statements of expert witnesses "impos[es] an obligation to report *any* relevant statements made by those intended witnesses, including oral statements they have made directly to defense counsel." (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 166–167 (*Roland*).) The defense must also disclose "the raw results of standardized psychological and intelligence tests administered by a defense expert upon which the expert intends to rely." (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1233 (*Hajek and Vo*), abrogated on another point by *Rangel*, *supra*, 62 Cal.4th at p. 1216.)

We review a trial court's finding that a discovery violation occurred for substantial evidence. (See *Riggs*, *supra*, 44 Cal.4th at p. 306 [finding substantial evidence supported trial court's finding that the defendant violated a discovery disclosure requirement].) We review discovery rulings for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225,

299.) "In particular, 'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to [a] violation of a discovery order.' " (*Ibid*.)

2. Procedural Background

The prosecution first moved to compel the defense to provide discovery in July 2015. By then, the prosecution had provided 4,593 pages of discovery to the defense and requested informal reciprocal discovery, but it had received nothing in response. Among other things, the prosecution sought "all reports, notes, writings, and computer generate[d] results of any scientific tests performed by any witness for the defense."[33]

On October 30, 2015, the trial court ruled on the prosecution's motion to compel, ordering the defense to provide statutory discovery "as soon as defense counsel determines who he intends to call as witness[es]" and "in no event later than November 20th, unless good cause is shown." The court warned defense counsel that if it later appeared he unreasonably or intentionally delayed discovery, the court would consider appropriate sanctions such as prohibiting "testimony of a witness whose identity or paperwork was unreasonably withheld."

On November 20, 2015, Cappello filed his trial witness list, identifying Smith as an expert witness. Although Smith had interviewed Cappello and administered a number of tests, including "an MMPI examination," more than a month earlier, Cappello did not provide any report or notes regarding Smith's testimony.

On December 2, 2015, defense counsel provided the prosecution a one-paragraph "Summary of interview" with Smith. The concluding sentence was that Cappello's character traits "as revealed by the evaluation and testing are that he lacks a propensity for violence, whether premeditated or resulting from impulsivity."

[33] The same day, Cappello moved to continue the trial. Later that month, the trial court granted Cappello's motion to continue (setting a trial start date of January 4, 2016) and took the prosecution's discovery motion under submission. Cappello subsequently filed a response to the discovery motion, stating he would be prepared to provide discovery by November 20, 2015.

The next day, the prosecution filed motions in limine, including requests for reports and statements of defense witnesses, including experts.

On January 4, 2016, the trial court granted the motions. Defense counsel told the court there were no reports by any of the expert witnesses.

On February 1, 2016, the jury heard opening statements and the first witnesses testified.

On March 2, 2016, Cappello filed a motion in limine to limit the scope of cross-examination of prospective defense expert witness Smith.[34]

The prosecution opposed Cappello's motion and filed a separate motion to exclude proposed defense witnesses "for whom discovery has been withheld," including Smith.

On March 10, 2016, the prosecution rested. Outside the presence of the jury, the court discussed the competing motions regarding defense expert Smith. The prosecutor told the court he had not yet received "a complete report that has the test itself and any test results." Defense counsel responded that there was no report, "only the results of the test which, as we indicated in our moving papers, are protected from disclosure by certain requirements, statutory requirements," although he did not identify any such statutory requirements. The trial court ordered the defense to provide the test results to the prosecution that day, and ordered the prosecution not to disclose the results to any person outside the prosecution team.

The next day, the court heard argument on the motions regarding Smith. The prosecutor stated he received a stack of documents related to Smith's testimony ("about an inch thick"), which he had not had time to review in depth, but which indicated that

[34] Cappello wrote that the purpose of the motion was "to establish the parameters of permissible cross examination so that counsel can make an informed decision whether to call Dr. Smith, and if so, to avoid protective and distracting evidentiary objections during cross-examination." He also wrote that defense counsel was concerned the prosecution would "attempt to parlay the psychological testing testimony into a vehicle to improperly and prejudicially expose the jury to every scurrilous and scandalous statement about defendant" that the trial court had excluded. At the same time, defense counsel sought a court order to preserve the confidentiality of psychological test results Smith obtained from administering "the standard MMPI test" to Cappello.

Smith had administered as many as 24 tests in September 2015. The documents included raw scores and percentages that the prosecutor did not know how to interpret, and he had no opportunity to discuss the results with any experts.

Asked why the documents were provided so late, defense counsel argued it was "appropriate and necessary" that he withheld the documents for three reasons. First, "the specifics of what the witness would testify to were disclosed" on December 2, 2015, in the summary of Smith's testimony. Second, the decision to have Smith testify was not made "until after important rulings by the Court were made during the trial itself and after testimony from a number of witnesses that cast aspersions . . . on Mr. Cappello, vis-a-vis his involvement with the Hells Angels or Mafia or Mob connection or statements that he made about the military and the like." Third, "the documents are subject to protection by statute and are not to be disseminated without Court order or at least a protective order because of the nature of their contents."

The trial court found that defense counsel would have known Smith was a likely defense witness once the court issued its pretrial evidentiary rulings allowing witness testimony on Cappello's asserted connections to the military and the Hells Angels and these rulings were made before the prosecution presented its case.

The trial court found discovery violations and ruled Smith would not be allowed to testify as a sanction for those violations.

The trial court found, based on evidence in the record, that defense counsel met with Smith in September and October 2015 and, thus, it appeared defense "counsel knew of the test results well before December" 2015. The court "d[id] not believe that defense counsel ever disclosed a report to this date of Dr. Smith's oral statements that complies with *Roland*," *supra*, 124 Cal.App.4th 154. It further noted that the 136-page report of Smith's test results (which was turned over to the prosecution on March 10, 2016) was "technical in nature and not readily understandable to a nonexpert" and did "not contain any summary of doctor's conclusions or opinions or description of how the raw test results lead him to the conclusions and opinions."

The court found the defense violated Penal Code section 1054.3 and the court's discovery order of January 4, 2016, and defense "counsel intentionally withheld the required disclosures." The court considered less severe sanctions and determined the remedy of witness preclusion was the only remedy that could adequately remediate the prejudice to the prosecution from the discovery violations.

3. The Finding of a Discovery Violation

Cappello argues there was no discovery violation because defense counsel had no obligation to provide the test results until he decided he was going to call Smith as a witness, and defense counsel did not make that decision until after he heard the prosecution's evidence.

As we have seen, however, this is not the correct standard for when the disclosure requirement arises. The defense's discovery obligations apply to " ' "all witnesses it reasonably anticipates it is likely to call." ' " (*Riggs, supra,* 44 Cal.4th at p. 305.) And, when the defense reasonably anticipates it is likely to call an expert witness, the concomitant "reports or statements . . . including the results of . . . mental examinations" of that potential expert witness must be disclosed along with the expert's name and address. (Pen. Code, § 1054.3, subd. (a)(1).)

Thus, the obligation to disclose relevant Smith-related documents (including test results) arose when defense counsel reasonably anticipated he was likely to call Smith as a defense expert. The record shows defense retained Smith as a psychological expert for this case; Smith interviewed and tested Cappello on September 5, 2015; defense counsel subsequently met with Smith for two case conferences in September and October 2015, which together lasted over three hours; defense counsel identified Smith as an expert witness in Cappello's witness list filed November 20, 2015; and defense counsel produced a one-paragraph summary of Smith's testimony on December 2, 2015, which referenced test results. These are circumstances from which the trial court could reasonably find that, by around November 20, 2015, and certainly no later than December 2, 2015, defense counsel "would reasonably anticipate that it was likely he would call" Smith as an expert witness. (See *Riggs, supra,* 44 Cal.4th at p. 306 [substantial evidence

supported the trial court's finding that the defense reasonably would have anticipated the likelihood of calling certain family members as alibi witnesses].) The trial court further could reasonably find defense "counsel knew of the test results well before December" 2015 and, therefore, his obligation to provide the prosecution the test results and other relevant Smith-related documents arose no later than December 2, 2015.

Cappello relies on *Sandeffer v. Superior Court* (1993) 18 Cal.App.4th 672 in arguing the trial court erred because it substituted its own belief regarding how and when defense counsel should have made strategic and tactical decisions for defense counsel's. We are not persuaded. In *Sandeffer*, the defense attorney told the trial court before trial that he had not decided whether to call a certain expert witness, but the court did not believe him and ordered the defense to provide information and documents related to that witness. (*Id*. at pp. 675–676.) On a petition for writ of mandate, the Court of Appeal held the trial court did not have the authority to make such an order. (*Id*. at p. 675.) The *Sandeffer* court explained, "[T]he determination of whether to call a witness is peculiarly within the discretion of counsel. Even when counsel appears to the court to be unreasonably delaying the publication of his decision to call a witness, it cannot be within the province of the trial judge to step into his shoes. While the court may suffer understandable annoyance at perceived violation by defense counsel of the discovery provisions of the act, it is limited to the remedies provided in the act for such stonewalling. The court may delay or prohibit the testimony of a witness whose identity or paperwork was unreasonably withheld. ([Pen. Code,] § 1054.5, subd. (b).) Accordingly, an attorney who flagrantly violates the act and the court's orders (as the court conceived to be the conduct of defense counsel in this case) takes a calculated risk that severe sanctions during trial may be imposed." (*Id*. at p. 678.)

This case does not help Cappello because the trial court here did not overstep its authority as the lower court did in *Sandeffer*. The trial court acknowledged that defense counsel may not have firmly decided to call Smith until well into the prosecution's case, but it explained, "it is irrelevant whether defense counsel had lingering doubts about calling Dr. Smith after placing his name on the witness list. Once Dr. Smith's name was

placed on the witness list, the statutory disclosure obligations were triggered." Thus, the court considered defense counsel's actions (listing Smith as a witness) in determining counsel's intentions; the court did not substitute its own judgment for how the defense case should be conducted.

4. The Sanction of Excluding Smith

Cappello next argues, assuming there was a discovery violation, that the trial court erred in imposing the sanction of precluding Smith from testifying.

"Upon a showing that a party has not complied with [Penal Code] Section 1054.1[35] or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or *prohibiting the testimony of a witness* or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (Pen. Code, § 1054.5, subd. (b), italics added.) A trial court "may prohibit the testimony of a witness . . . only if all other sanctions have been exhausted." (*Id*., subd. (c).)

If a party willfully fails to provide discovery to obtain a tactical advantage, the court may exclude the relevant witness's testimony. (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203 (*Jackson*).) And it has been observed that, in some instances, alternative sanctions short of exclusion "would perpetuate 'prejudice to the State and . . . harm to the adversary process.' " (*Ibid*., quoting *Taylor v. Illinois* (1988) 484 U.S. 400, 413.) Courts have also recognized, however, that exclusion of testimony is not an appropriate sanction unless there is a showing of significant prejudice and willful conduct. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 358; *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.)

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[35] Penal Code section 1054.1 governs the discovery the prosecution must provide to the defense.

Cappello argues there is no evidence to support the trial court's findings that the failure to disclose was willful or motivated by a desire to obtain tactical advantage, and that lesser sanctions would be ineffective. We disagree.

First, we find substantial evidence to support the court's implicit finding that defense counsel's discovery violation was willful or motivated by a desire to obtain tactical advantage.[36] The trial court could infer from evidence in the record that defense "counsel knew of the test results well before December" 2015. Yet, the defense did not disclose the test results as required by Penal Code section 1054.3 and the court's orders of October 30, 2015, and January 4, 2016. When asked (on March 10, 2016, after the prosecution rested) to explain his conduct, defense counsel argued that providing the one-paragraph summary of Smith's testimony was sufficient and that unexplained "statutory requirements" justified withholding the test results. The trial court could reasonably find that defense counsel was being disingenuous in offering such meritless justifications for his conduct, and from that finding, it could infer defense counsel violated the discovery obligations willfully. Discussing willful discovery violations, an appellate court observed, "It is not unreasonable to suspect testimony from 'a defense witness who is not identified until after the 11th hour has passed.' " (*Jackson*, *supra*, 15 Cal.App.4th at p. 1203.) Here, it was not unreasonable for the trial court to suspect a willful discovery violation based on defense counsel's failure to provide more than a hundred pages of discovery documents until after the prosecution finished its case in chief.

Second, the trial court reasonably could find that lesser sanctions would not be adequate to remedy the prejudice to the prosecution caused by the willful discovery violation. The prosecution argued, "[G]iven the lateness of the discovery . . . , and the complexity of this case, no remedy short of exclusion will preserve the People's right to due process and a fair trial. It is simply not possible for the prosecution to prepare to

[36] By imposing the sanction of exclusion, the trial court implicitly found that defense counsel's discovery violation was willful or motivated by a desire to obtain tactical advantage. The court also expressly found defense counsel's violation was intentional, a strong indication that the court found his conduct willful.

cross examine an expert on 136 pages of technical psychological data without the assistance of a qualified expert. The People cannot hire and prepare an expert to rebut Mr. Smith's conclusions while the prosecution is in trial." Agreeing with the prosecution, the trial court found that a continuance was not reasonably practical so late in the trial and after the prosecution had rested its case.

Cappello asserts the trial court could have addressed any perceived prejudice by granting a short continuance if truly necessary. But we see no error in the trial court's reaching a contrary finding. The trial court reasonably could have found, as the Attorney General suggests, that granting a sufficiently long continuance to allow the prosecution to find and retain an expert to review the evidence in preparation for cross-examination of Smith would have prejudiced the prosecution by making the case in chief "seem more remote than the defense" and "would have been a hardship on the jury that late in a very long trial."

In sum, we conclude there was sufficient evidence to support the trial court's findings that the failure to disclose test results was willful or motivated by a desire to obtain tactical advantage and that no sanction short of exclusion would remedy the prejudice to prosecution caused by the discovery violation. We find no abuse of discretion by the trial court and no violation of Cappello's right to present a defense. (See *Hajek and Vo, supra,* 58 Cal.4th at p. 1233 [finding no abuse of discretion in trial court's order precluding a defense expert's testimony as a sanction for a discovery violation that adversely affected the prosecutor's ability to cross-examine the expert, and concluding the defendant failed to demonstrate the application of the discovery statutes violated his right to present a defense].)

E. *Exclusion of Evidence that Wyatt Previously Testified for the Prosecution*

Wyatt testified for the defense that Odin admitted to him in jailhouse conversations that he (Odin), not Cappello, was the killer. Wyatt also testified that he wrote a letter to the district attorney's office in 2013 about Odin's jailhouse statements. In Wyatt's 2013 letter, he wrote that he previously testified for the district attorney's

office in 2008. The trial court allowed Wyatt's 2013 letter in evidence, but redacted the sentence about Wyatt having testified for the district attorney's office in 2008.

Cappello contends the trial court erred in excluding evidence that Wyatt was a "reliable confidential informant." This claim lacks merit because the trial court never excluded evidence that Wyatt was a "reliable confidential informant" as defense counsel never attempted to present such evidence. Cappello also claims the prosecutor committed misconduct in his closing argument in attacking Wyatt's credibility. We find no prejudicial misconduct.

1. Background

In direct examination, defense counsel elicited testimony that Wyatt had written him (defense counsel) in January 2016. Wyatt had asked for defense counsel's help on a writ of habeas corpus and told him he had information on a case. Wyatt testified that he was not testifying in Cappello's case in the hope of receiving legal help from defense counsel. Defense counsel also brought out in direct examination that Wyatt was convicted of felony possession for sale of marijuana in 1998, felony rape of an unconscious person in 2002, and felony infliction of traumatic condition on a cohabitant or spouse in 2005 and 2014.

In cross-examination, the prosecutor elicited testimony that, at the time Wyatt tried to contact the district attorney's office in 2013 about Odin's jailhouse statements, Wyatt was in custody for felony domestic violence, felony assault with great bodily injury and a prior strike, "a bunch of misdemeanors," including five restraining order violations, and a DUI. The bail for some of the felony charges was set at $1.5 million. Wyatt was convicted of numerous offenses and sentenced to eight years. The prosecutor did not ask Wyatt whether, when he wrote the letter to the district attorney's office in 2013, he was hoping to receive some consideration from the district attorney's office in exchange for testimony about what Odin said to him.

In discussions outside the presence of the jury, defense counsel stated he wanted to ask Wyatt "a couple quick questions" on redirect about Wyatt having testified as a witness for the prosecution in a criminal trial in 2008. He argued the prosecutor's

questions about Wyatt's convictions and bail related to his credibility, opening the door to this line of questioning. Defense counsel also sought to admit Wyatt's 2013 letter to the district attorney's office and requested to call district attorney investigator Dempsey to show that the district attorney's office *received* Wyatt's letter in 2013 and to establish that Wyatt testified for the prosecution in 2008.

The trial court held a hearing on defense counsel's requests the next court day. The court ruled Wyatt's 2013 letter was generally admissible. Following this ruling, the prosecutor stipulated to the fact that the letter was received by the district attorney's office on April 13, 2013.

But the trial court ruled defense counsel would not be permitted to asked Wyatt on redirect examination about having testified for the prosecution in a criminal case in 2008, finding the prosecution's cross-examination did not open the door to defense counsel's proposed line of questioning. The court redacted from Wyatt's 2013 letter the sentence, "I have testified for the district attorney's office in 2008." Defense counsel asked to reopen direct examination of Wyatt, and the trial court denied the request.

The redacted version of Wyatt's letter admitted in evidence read in relevant part, "My name is Charles Martin Wyatt. I am presently housed at the Sonoma County Main Adult Detention facility. [redacted] I am willing [to] cooperate and testify to what Mr. Dwyer has told me, without any promises, consideration or other inducements. [¶] Please feel free to contact me with any questions or if I can be of further service."

2. Analysis

Cappello claims the trial court erred in excluding "evidence that Wyatt was a reliable confidential informant." This argument fails because defense counsel never attempted to present evidence that Wyatt was a "reliable confidential informant."

Cappello relies on *Harris*, *supra*, 47 Cal.3d at pages 1080–1082, in which our high court held evidence of a witness's past reliability as an informant was admissible to support that witness's credibility. In *Harris*, a sheriff's sergeant testified that a trial witness had provided reliable information in the past. (*Id*. at p. 1080.) The officer's testimony was, in effect, character evidence for honesty—"evidence of specific instances

of the informant's past reliability as relevant to the informant's [current] credibility." (*People v. Lankford* (1989) 210 Cal.App.3d 227, 239.)

Cappello argues, "Evidence that Wyatt was a reliable confidential informant was relevant to his credibility." But defense counsel in this case did not offer evidence that Wyatt was a "reliable confidential informant" or that he had provided law enforcement reliable information in the past. He sought to establish only that Wyatt was a prosecution witness in a criminal case in 2008. Cappello cites no authority for the proposition that merely testifying for the prosecution in the past is relevant to current credibility, and we are not aware of any. Evidence that Wyatt testified in a criminal trial would not establish that he testified truthfully at that trial and, therefore, would not be relevant to his credibility under *Harris*. Accordingly, the trial court did not abuse its discretion in ruling defense counsel could not ask about the prior testimony on redirect examination. Likewise, the trial court did not abuse its discretion in denying Cappello's request to reopen Wyatt's testimony. (See *People v. Homick* (2012) 55 Cal.4th 816, 881–882 [no abuse of discretion in denying motion to reopen where the proffered evidence was not sufficiently significant to warrant reopening]; *People v. Cooks* (1983) 141 Cal.App.3d 224, 327–328 [no abuse of discretion in denying motion to recall witness where further questioning was not relevant to the issues in the case].)

3. Asserted Prosecutorial Misconduct

Cappello also asserts the prosecutor engaged in misconduct in discussing Wyatt in rebuttal. We find no prejudicial error.[37]

a. *Relevant Closing Arguments*

The prosecutor did not discuss Wyatt in his closing argument. In defense counsel's closing argument, he urged the jury to credit Wyatt's testimony. Defense counsel acknowledged an inference could be made that Wyatt's initial motive for contacting the district attorney's office was to trade claimed information about Odin for a

[37] We address the merits of the claim even though defense counsel failed to object and request admonition. (See *Ochoa, supra*, 19 Cal.4th at p. 431 [addressing forfeited claim of prosecutorial misconduct].)

"deal" in his own pending criminal case. But defense counsel tried to refute this inference with Wyatt's own words in his 2013 letter, pointing out that Wyatt wrote he was willing to cooperate and testify about what Odin told him " 'without any promises, consideration, or other inducements.' "

In rebuttal, the prosecutor responded to defense counsel's defense of Wyatt's credibility as follows. (The phrases Cappello now objects to are in italics.)

"Let's talk about Charles Wyatt for a minute. . . . He came up with a lie about what happened. He shopped that lie to the DA's office. The DA's office didn't bite. The DA's office made that known to the defense . . . . So nobody's hiding anything with regard to Charles Wyatt.

He continued, "*The DA did not work with* Charles Wyatt in this case at all. Why? Think about that. . . . First of all, he is a *bit of a monster*, honestly, if you think about it. Rape of an unconscious person. Repeated domestic violence. Strike prior. Bail over a million dollars. He's a *career criminal*. A *very dangerous guy*. And he gives advice to people in jail on how to work the Court or work the system. Do you remember that testimony? He was telling Odin about how to handle himself in the courtroom and the court process . . . . So he's a sophisticated criminal.[38]

"So he writes a letter to the DA when he's got I don't remember how many charges pending. A lot. Is he one of those unbiased citizen informants that [defense counsel] talked to you about with no agenda of his own out of the goodness of his heart? . . . [N]o, of course not. And of course he's looking for a quid pro quo, a this for that. . . .

". . . If he wrote a letter and said, 'I'll tell you something about one of your murder defendants if you cut my sentence in half or if you dismiss half of my charges or on

[38] Wyatt testified his initial conversations with Odin were about their charges, court dates, and the like. Odin did not seem to know a lot about the court system and, Wyatt said, "unfortunately, I do." Odin had a lot of questions about the court process and extradition. Wyatt testified, "[H]e would ask me questions about the legal process. And I—I wouldn't give him legal advice, but I would help to kind of guide him through about what to expect in court, that—that sort of thing."

conditions that you do something.' [*sic*] But because he's a career criminal, *because he's sophisticated,* he knows how the system works. *He knows . . . the DA's office . . . is going to say*, 'No, thank you. That's crazy. *We're not interested in doing that*.' [¶] . . . So in the letter in order to get the DA to bite, he says, 'Hey, I'll talk to you no expectations.'

"Of course he wanted a deal. When the DA's office didn't bite, he sent the same information to the defense where they followed up and talked to him about it. . . . He did ask them, 'Hey, help me on my appeal of this sentence.' So he's looking for something whether it's the DA's office or it's the defense attorney. . . . [¶] . . . [Wyatt] definitely has an agenda. And the fact that he's saying something in the letter to the contrary is not very persuasive, especially given what he's all about and how sophisticated he is."

After responding to defense counsel's position that Wyatt had no "agenda," the prosecution attempted to explain the basis for Wyatt's testimony. He argued Wyatt didn't realize he "picked the wrong defendant." That is, Wyatt did not know that Odin had already given a detailed statement to law enforcement and that the sheriff's department had already found evidence corroborating Odin's version of events. The prosecutor told the jury there was no way Odin would tell the truth to law enforcement on February 26, 2013, and then a month later say "all of that crazy stuff" to Wyatt. The prosecutor then said, "So how did Charles Martin Wyatt come up with that information? . . . The news. . . . The facts of this crime were not limited to the sheriff's department crime reports. They were actively being published in the *Press Democrat*. That's how Kim Crumb found out and called in about it. . . . So the public at large, including *people in the jail, have access to the media* and to the facts as they were known at the time or as they were believed to be at the time. So he was able to *pick and choose all kinds of information from facts that were widely disseminated in the public and certainly in the jail*. You don't think in the jail people talk about what they're in for or 'Did you hear about that big triple homicide?' Things like that. [Wyatt] just picked the defendant thinking he would be able to get a benefit from the DA's office based on information that he received from public sources or from rumors. And it's not consistent

with anything Odin has ever said, and it's not consistent with what you know to be the facts. [¶] So he was just taking a shot in the dark to get out from underneath some serious charges." (Italics added.)

b. *Analysis*

"A criminal prosecutor has much latitude when making a closing argument. Her argument may be strongly worded and vigorous so long as it fairly comments on the evidence admitted at trial or asks the jury to draw reasonable inferences and deductions from that evidence." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1330.) A prosecutor "has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.)

" 'When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.' [Citation.] . . . ' "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." ' " (*Jablonski*, *supra*, 37 Cal.4th at p. 835.)

Cappello first claims the prosecutor improperly told the jury that "the DA would not work with someone like Wyatt." We reject this claim because the prosecutor did not make this assertion. Instead, the prosecutor accurately told the jury that the district attorney's office did not work with Wyatt "in this case." The prosecutor then reminded the jury that Wyatt had been convicted of domestic violence and rape of an unconscious person, and the jury was entitled to infer that these felony convictions "affected the veracity and persuasive value of" Wyatt's testimony. (*People v. Shazier* (2014) 60 Cal.4th 109, 147 [conviction of rape relevant to witness's credibility]; *People v. Burton*

(2015) 243 Cal.App.4th 129, 136 [conviction of willful infliction of corporal injury on cohabitant or spouse admissible for impeachment purposes].) That the prosecutor called Wyatt "a bit of a monster" and a "very dangerous guy" based on these convictions does not establish misconduct. (See *People v. Shazier*, *supra*, at p. 146 ["Harsh and colorful attacks on the credibility of opposing witnesses are permissible if fairly based on the evidence."].)[39]

Cappello next argues that the prosecutor implied he "simply did not believe" Wyatt and "raised the possibility the jury would assume the prosecutor had undisclosed knowledge regarding Wyatt's information." He argues that the prosecutor, in effect, "vouched" for the *lack* of credibility of Wyatt.

"It is misconduct for prosecutors to bolster their case 'by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it.' [Citation.] Similarly, it is misconduct 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.' [Citation.] . . . However, these limits do not preclude all comment regarding a witness's credibility." (*People v. Bonilla* (2007) 41 Cal.4th 313, 336 (*Bonilla*).) "[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching." (*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, the prosecutor did not improperly "vouch" for Wyatt's dishonesty. He relied on Wyatt's felony convictions to impeach his credibility. He suggested that Wyatt's motive for contacting the district attorney's office was to obtain a more favorable result in his own pending criminal case, which was a reasonable inference from the

[39] Also that Wyatt is a "career criminal" could be inferred from his many convictions and his own testimony that he "unfortunately" knew a lot about the court system.

evidence.[40] He argued that Odin's version of events as told to law enforcement was corroborated by physical evidence, but Wyatt's version of events (that Odin was the killer) was not so corroborated. (Cf. *Bonilla*, *supra*, 41 Cal.4th at p. 337 [permissible to argue witness should be believed because other evidence corroborated his testimony].) But the prosecutor did not state that the district attorney's office had never worked with Wyatt or that it would never work with Wyatt. Nor did he state that he personally did not believe Wyatt.

Cappello complains that the prosecutor's comments shown in italics above were problematic because he knew Cappello had evidence that he was precluded from presenting from which the jury could infer that Wyatt was credible. This claim fails because evidence that Wyatt testified for the prosecution in a criminal trial in 2008 was not relevant to Wyatt's credibility.[41]

Finally, Cappello argues the prosecutor improperly went beyond the evidence in arguing Wyatt must have gotten information about the triple homicide from news media. "While counsel is accorded 'great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation],' counsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence." (*People v. Valdez* (2004) 32 Cal.4th 73, 133.)

The Attorney General responds that the prosecutor's argument was a reasonable inference from the facts that news is widely available,[42] the murders took place only a

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[40] Recall that when Wyatt contacted defense counsel and told him about his information on Odin, he asked for help on his writ of habeas corpus.

[41] Because there was no prosecutorial misconduct, we also reject Cappello's claim of ineffective assistance of counsel based on failure to object to the comments. "Representation does not become deficient for failing to make meritless objections." (*Ochoa, supra*, 19 Cal.4th at p. 463.)

[42] Here, Crumb testified he read about the case in the Press Democrat. And there was evidence that Cappello viewed news articles on the murders on his laptop computer while he was in Colorado and Alabama.

few miles from the jail, and "Wyatt was in local custody where rules and restrictions were far more relaxed."

We think it reasonable for the prosecutor to argue Wyatt could have learned about the crime from other jail inmates. Wyatt testified that he could talk to Odin because their cells were connected by a vent through which they could hear each other, and there were four cells connected in this way. He also talked to Odin in the day room area when they were let out of their cells along with four or six groups of inmates (and this occurred once or twice a day). Wyatt testified they had normal "jailhouse conversation, what are you here for, court dates." This was testimony from which the jury could infer Wyatt had the opportunity to talk to many inmates, and he could have learned about the details of the crime from any inmate who entered custody after the details of the crime were covered by news media.

On the other hand, we agree with Cappello that it was a stretch for the prosecutor to argue Wyatt had access to media reports in jail when there was no evidence presented on that issue. To prevail on a claim of a prosecutorial error, however, Cappello must show prejudice. " 'A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' " (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) Here, given that the jury reasonably could have inferred that Wyatt learned about the details of the crime from others, we fail to see how the prosecutor's improper comment about access to news media in jail could have harmed Cappello. Finally, because there was no prejudice, Cappello's claim of ineffective assistance of counsel for failing to object also fails. (*Ochoa, supra*, 19 Cal.4th at pp. 414–415.)

F. *Cumulative Error*

Cappello argues that the various errors he has raised are cumulatively prejudicial. We have rejected many of his claims. We have concluded it was error to admit Odin's and Francis's entire police interviews without regard to which portions were relevant to rehabilitate credibility, but we have found the error harmless because Cappello has failed

to demonstrate how the inadmissible portions of the interviews could have affected the jury's credibility assessments of Odin and Francis to Cappello's harm. We have assumed for the sake of argument that the prosecutor's cross-examination of Cutting regarding assessing the credibility of the Dwyers was inadmissible and that the issue has been preserved for appeal, but we have found no possible prejudice because defense counsel elicited testimony from Cutting that was similar to the testimony elicited in cross-examination that Cappello now challenges. We have assumed it was error to allow evidence that Cappello possessed a hunting knife and sometimes kept a knife in his Bronco and that he sometimes carried a handgun, but we discern no prejudice given the properly admitted evidence that Cappello owned a Springfield .45 caliber semiautomatic handgun and possessed a DVD on advanced pistol training. We have assumed for the sake of argument that it was error to admit evidence of Cappello's unlawful drug-related activity that was not connected to the marijuana trade, but we have found any error harmless because the victims and primary prosecution witnesses were also involved in the illegal drug trade. We have concluded that the evidence of Cappello's empty threats and boorish behavior was irrelevant and inadmissible, but we have found this error harmless because the conduct was so minor compared to the charged crimes there is no risk this evidence affected the verdict. And we have assumed it was improper for the prosecutor to argue that Wyatt had access to news media in jail (and, for the sake of argument, further assumed the issue was preserved for appeal), but we have found the claimed prosecutorial misconduct harmless in the context of his overall argument.

Even considering these errors and assumed errors together, we conclude they were harmless. "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill* (1998) 17 Cal.4th 800, 844; see *People v. Poletti* (2015) 240 Cal.App.4th 1191, 1217 [finding no cumulative prejudice where there was an evidentiary error and three incidents of prosecutorial misconduct].) The jury had ample opportunity to assess Odin's and Francis's credibility based on their trial testimony and admissible evidence. Corroborating physical evidence and witness testimony established that the gun parts the

Dwyers disposed of near the crime scene belonged to Cappello; that Cappello's clothes, the vinyl bra to his Bronco, and nitrile gloves were disposed of in the area; that, in Colorado, Cappello washed a large amount of cash for the stated purpose of getting rid of Klarkowski's fingerprints; and that Cappello fled Colorado and was found in Mobile, Alabama, with three passports and a Brazilian driver's license. As we have mentioned, after a long trial (including 22 days of witness testimony), the jury reached its verdict in one day. There is no reasonable probability the jury would have reached a result more favorable to Cappello absent the errors and assumed errors.

G. *Senate Bill No. 620*

The jury found Cappello personally and intentionally discharged a firearm, proximately causing great bodily injury in the commission of counts 1 through 3 (murder) and count 6 (robbery). As a result, the trial court imposed four enhancements of 25 years under Penal Code section 12022.53, subdivision (d). At the time of sentencing, the firearm enhancements were mandatory. (See former Pen. Code, § 12022.53, added by Stats. 2010, ch. 711, § 5.)

Effective January 1, 2018, however, Senate Bill No. 620 amended Penal Code section 12022.53, providing trial courts with discretion "in the interest of justice pursuant to [Penal Code] Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section." (Stats. 2017, ch. 682, § 2; Pen. Code, § 12022.53, subd. (h).)

The parties agree the current version of Penal Code section 12022.53 applies retroactively to Cappello's case. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 424 [the discretion conferred by section 12022.53 applies retroactively to nonfinal judgments] (*McDaniels*).) Cappello asks us to remand the matter to the trial court to decide whether to strike any or all of the firearm enhancements, but the Attorney General argues remand is unnecessary because there is no possibility the trial court would exercise its discretion to strike any of the firearm enhancements given that the court departed upward from the

probation officer's recommendation and did not exercise its discretion to reduce the sentence where it could.[43]

Although the trial court agreed with the prosecutor's recommendation in sentencing Cappello, it did not state that its intent was to impose the maximum possible sentence nor did it state it would never consider striking one of the mandatory firearm enhancements if it had discretion to do so. Therefore, in an abundance of caution, we conclude "a remand is proper because the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements." (*McDaniels*, *supra*, 22 Cal.App.5th at pp. 427–428.) We express no opinion on how the court should exercise its discretion on remand.

DISPOSITION

The convictions are affirmed, but the case is remanded for the trial court to consider whether to strike any or all the firearm enhancements imposed under Penal Code section 12022.53.

[43] The probation officer recommended six years for count 6 (robbery), plus the mandatory 100 years to life for the four firearm enhancements, plus three *concurrent* LWOPs for counts 1 through 3 (special circumstances first degree murder). He recommended staying punishment for counts 4 (burglary) and 5 (conspiracy to possess marijuana) under Penal Code section 654. The prosecutor agreed that the burglary conviction (count 4) merged with the robbery (count 6), but he argued the conspiracy (count 5) was a different type of crime, and Penal Code section 654 should not apply, so Cappello should receive an additional 8 months (one-third the midterm) for count 5. He also asked for three *consecutive* LWOP terms. The trial court followed the prosecutor's recommendations. The prosecutor suggested three consecutive LWOP terms would recognize there were three murder victims in this case.

_____
Miller, J.

We concur:

_____
Kline, P.J.

_____
Stewart, J.

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